DCN 1546

Ben Borden

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

DRAFT

SEN. WILLIAM S. COHEN, et al., Plaintiffs, v. DONALD RICE, Secretary of the Air Force, et al., Defendants.	)	Civil Action No. 91-0282-B

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

On May 20, 1991, this Court dismissed most of the claims in this case, concluding that the plaintiffs' numerous challenges to the merits of the recommendation to close Loring "are not subject to second guessing by the judiciary."[1] Thus, the factors considered by the Air Force and the Defense Base Closure and Realignment Commission (the "Commission") in recommending Loring's closure, and the accuracy of the data on which those recommendations were based, are no longer issues in this case.[2]

The few remaining claims are purely procedural. The Court has held that it may review whether the Air Force made available to the General Accounting Office ("GAO") and the Commission all information used in developing the Air Force's recommendations,

[1] Slip op. at 11 (quoting Specter v. Garrett, No. 91-1932 (slip op. April 17, 1992), 1992 U.S. Lexis 6969).

[2] In its Scheduling Order of June 9, 1992, the Court set July 24, 1992 as the deadline for filing of motions, and in its subsequent Order dated June 10, 1992. This summary judgment motion is filed pursuant to that Order.

and whether the Commission improperly considered information that had not been made publicly available or that was received after the close of public hearings.[3]

The facts relating to these issues are easily established and not reasonably in dispute. As the declarations filed in support of defendants' motion demonstrate, both the Air Force and the Commission fully complied with the Act's rather modest procedural requirements. The Air Force cooperated with GAO throughout the process, providing extensive documentation of its process and permitting GAO access to Air Force officials at all levels across the country. The Air Force also made all of its information available to the Commission, responding to staff inquiries up until the evening of the Commission's final deliberations.

The Commission similarly provided the public virtually unlimited access to the information it gathered. In the ten weeks available, not only did the Commission hold 28 public hearings across the country and 40 visits to various bases, but Commissioners and Commission staff held almost constant meetings with Members of Congress and representatives of bases recommended for closure, including eleven separate meetings with the plaintiffs in this case. The Commission also considered vast submissions from the plaintiffs challenging the recommendation to close

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[3] See Amended Complaint ¶¶ 64(d), 67 (second sentence), 68(A), 70(a), 70(b); 1990 Defense Base Closure and Realignment Act, Pub. L. 101-510, Title XXIX (the "Act"), codified at 10 U.S.C. § 2687 note.

Loring. All of these procedures were far in excess of what the Act required.

The Amended Complaint also contends that the defendants violated the Act by failing to make information available to Congress, see ¶¶ 67, 68(A), 70(a), a theme the congressional plaintiffs continually repeated in Senate hearings. That claim simply ignores the limited requirements of the Act, which do not require either the Department of Defense or the Commission to provide information to Congress during the process.[4] Because the facts demonstrating defendants' compliance with the Act are simply not subject to genuine dispute, defendants are entitled to judgment as a matter of law.

Even if the plaintiffs could make out a case on the facts, there are two purely legal issues that require dismissal of the remaining claims. First, the Supreme Court has recently decided that there is no "final agency action," and therefore no judicial review, under the Administrative Procedure Act where an agency merely transmits recommendations to the President for decision. Franklin v. Massachusetts, No. 91-1502 (slip op. June 26, 1992), 1992 U.S. Lexis 4531, attached as Exhibit x. The Supreme Court's reasoning squarely applies to the Base Closure Act, and the Court should reconsider its implicit ruling that there is "final agency

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[4] Congress was apparently aware that the Act imposed no such requirement. In recent amendments to the Act, Congress added several provisions that specifically require the Department of Defense to supply information to Congress. See Pub. L. No. 102-190, §§ 2821(c), (e), (i), 105 Stat. 1290, 1545 (December 5, 1991).

action" to review.

Second, the Court should also resolve an issue explicitly left open in the Court's May 20, 1992 opinion: whether or not any violation of the Act that plaintiffs might prove mandates a judicial remedy. See slip op. at 12. Under the unique statutory scheme at issue in this case, the Court could not possibly craft a remedy for any technical errors the plaintiffs might prove without effectively overturning a military decision made by the President and approved by Congress -- a remedy that would ignore not only the Act but constitutional separation-of-powers concerns. As a matter of law and as a matter of fact, plaintiffs' claims are meritless and judgment should now be entered for defendants.

STATEMENT OF FACTS

1. Pertinent Provisions Of The Act

As explained in more detail in defendants' motion to dismiss, the Act established a unique mechanism for arriving at the political consensus that had eluded earlier base closure efforts. After the Department of Defense and the independent, bipartisan Commission develop tentative recommendations for closure, the Act confers on the President discretion to accept, reject or remand the recommendations to the Commission. If the President accepts the proposals, they are forwarded to Congress for additional review. In this case, after receiving the President's decision, both the Senate and the House of Representatives conducted

hearings on the decision; the Senate, in particular, held extensive hearings concerning Loring.[5]

Only a few provisions of that Act remain at issue in this case. First, § 2903(c)(4) requires the Air Force to "make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission."[6] With respect to the Commission's responsibilities, the Act requires that "the Commission shall conduct public hearings on the recommendations," § 2903(d)(1), and that the Commission shall provide information it used to Members of Congress, upon request, "[a]fter July 1 of each year in which the Commission transmits recommendations to the President." § 2903(d)(4).

2. The Air Force's Process Under The Act

In December, 1990, shortly after the Act was passed, the Secretary of the Air Force appointed a Base Closure Executive Group ("BCEG") to review data, categorize bases, and develop options for closure and realignment of Air Force bases. The BCEG consisted of five general officers and five senior career civilians with expertise in a wide range of areas, such as environmental, financial, legal, logistical, and economic specialties.

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[5] See Hearings Before The Senate Armed Services Committee: Defense Base Closure and Realignment Commission, S. Hrg. 102-371 (July 23, 25; September 12, 1991). Excerpts from these hearings are attached as Exhibit **x**.

[6] The Act has since been amended to require the Secretary also to make information available "to Congress (including any committee or member of Congress)." Pub. L. No. 102-190, § 2821(e), 105 Stat. 1290, 1545 (December 15, 1991).

cite AF decl, GAO Rept, hearings. The Secretary also established a Base Closure Working Group to collect and verify the accuracy of information, and directed the Air Force Audit Agency, an internal Air Force component, to review the BCEG's procedures for accuracy and compliance with both the Act and Department of Defense ("DOD") policy. **cite.**

The BCEG met frequently beginning in December 1990, and met daily in February and March in order to develop the Air Force's recommendations, which were to be transmitted to the Secretary of Defense by March 15, 1991. **cite AF Detailed Analysis.** Detailed minutes of all of these meetings were kept, and were transmitted to the General Accounting Office ("GAO") and the Commission on April 15, 1991, the same day the Secretary of Defense announced his recommendations. **AF decl.** In addition, rather than developing a list of recommendations to be presented to the Secretary of the Air Force at the end of the process, the BCEG members met with the Secretary throughout the process, keeping him apprised of the BCEG's progress and the issues it was considering. **decl.**

To begin its analysis, the BCEG identified and categorized all Air Force bases with more than 300 civilian employees, which were the bases subject to the Act's requirements. See § 2909(c)(2) (incorporating 10 U.S.C. § 2687). Of the 86 active bases identified, 23 were then excluded from consideration because the BCEG determined that there was no "excess capacity" in those categories: that is, that all of these bases were required to support the projected force structure. **decl.** In

addition, the BCEG also excluded 12 bases that were considered essential because of their unique geographic location or military capabilities.[7]

To select possible closure candidates from the remaining 51 bases, the BCEG developed a detailed questionnaire, which rated bases on as many as 83 separate elements. **detailed analysis/decl.** The questionnaires were answered by the major commands, with copies sent to individual bases for verification of the data. The major commands reviewed the bases' suggested changes. All information used by the BCEG, however, was that supplied by the major commands (including the one relevant to this case, the Strategic Air Command ("SAC")). **cite decl.**

SAC, among other commands, viewed "quality of life" as one important measure of an installation's military value. Accordingly, the BCEG made several attempts to measure that factor and include it in the analysis. However, these attempts were unsuccessful, and the BCEG ultimately concluded that "quality of life" had to be excluded as a criterion. **cite decl; BCEG minutes.**

Each member of the BCEG then individually assigned a color-coded ranking (red, yellow, or green) to each of the elements for each of the bases. **Det. Anal.** A "red" ranking meant that a base fell below established Air Force standards on a particular data

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[7] For example, the Air Force excluded Andersen Air Force Base ("AFB") in Guam, and Hickam AFB in Hawaii, because of their unique location in the Pacific. Similarly, the Air Force excluded F.E. Warren AFB in Wyoming because that base is the only Peacekeeper missile base, and excluded the Air Force Academy in Colorado because it is the primary commissioning source of Air Force officers. **cite (detailed analysis at Tab 4 Attachment 4)**

element; a "yellow" meant that the base minimally satisfied the requirement; and a "green" ranking indicated that the base met or exceeded the standard. **Id.** The BCEG then, by consensus or vote, agreed on a color code for each base on each of the elements.

Next, the BCEG ranked the strategic bases against each other, using six different models. **cite Det. Anal. chart.** All six models emphasized military value, but some models also stressed or downplayed other factors, such as cost, readiness and training, future needs, and wartime needs. Within each of the six models, the BCEG broke the rankings down into three groups.

The entire BCEG met with the Secretary of the Air Force and the Air Force Chief of Staff on **date** to discuss the various options. The Secretary decided to use the model listed in **cite chart** as "Option 5," which was the most inclusive, emphasizing readiness and training, future needs, and cost.

The BCEG's capacity analysis at the beginning of the process had determined that the Air Force could close six strategic bases. There were six strategic bases listed in the lowest group under Option 5: Carswell, Eaker, Grissom, Loring, Plattsburgh, and Wurtsmith. However, the BCEG had determined that Loring and Plattsburgh could not both be closed, because closure of these two northeastern bases would leave only Griffiss AFB in that area, which was deemed unable to support all of the Air Force's requirements for the region. The Secretary therefore chose to recommend closure of Loring, concluding that its long-term military value was limited and that savings from its closure

would be high. The Secretary also chose Castle AFB, which had been ranked in the next higher group, as the sixth base to recommend for closure. These recommendations were transmitted to the Secretary of Defense.

3. The Role of the General Accounting Office

The Act provides for participation in the base closure process by the GAO in two ways. First, the GAO was required to assist the Commission in the Commission's review and analysis of the Secretary's recommendations "to the extent requested" by the Commission. Section 2903(d)(5)(A). Second, the GAO was required to submit to Congress and to the Commission, by May 15, 1991, a report containing a "detailed analysis" of the Secretary's recommendations and selection process. Section 2903(d)(5)(B).

GAO officials began coordinating their review of the Air Force's process almost immediately after the Act was passed, and before the Air Force had even established the procedures it would follow. **cite AF decl.** Between January 14, 1991 and May 5, 1991, as the BCEG was developing its rankings, GAO was permitted to work in the Air Force's headquarters offices, and visited several major commands (including SAC, headquartered in Nebraska). **cite AF decl.** GAO was permitted to discuss both the process and specific data with Air Force officials at all levels in the decisionmaking chain. **cite AF decl, GAO Rept.** The Air Force also provided GAO extensive documentation of its process, opening all of its data and files, both classified and unclassified, to GAO scrutiny. **AF decl** Members of the Working Group also had

numerous meetings with GAO officials to describe the Air Force's procedures. As part of this policy of openness, GAO was also aware both of the Air Force's effort to include "quality of life" in its analysis, and the BCEG's ultimate conclusion that that factor had to be excluded because it could not be measured accurately.

On May 15, 1991, GAO submitted a report entitled "Military Bases: Observations on the Analyses Supporting Proposed Closures and Realignments" ("GAO Report"). As explained in more detail below, the GAO was fully satisfied both that it had been permitted access to all information used by the Air Force in developing its recommendations, and that the Air Force had adequately documented its reasoning and reached reasonable conclusions. See, e.g., GAO Report at 4, 42-43, 64.

4. The Formulation of the Commission's Recommendations

Following receipt of the Secretary of Defense's recommendations, the Base Closure Commission proceeded with its analysis. In just two and a half months, the Commission conducted twenty-eight public hearings, including one in Boston, at which Loring was discussed extensively, and one in which testimony from the congressional plaintiffs was heard. See Defense Base Closure and Realignment Commission Report to the President, Appendix G ("Commission Report"). All the unclassified information that the Commission received from any source was available to the public. Congress Declaration of Jim Courter ("Courter Decl.") ¶ x. The public was freely permitted to provide the Commission information, analysis

and argument throughout the Commission's review; the Commissioners even considered information passed to them on handwritten notes during the final weekend of deliberations. Id. ¶ x.

With the assistance of detailed employees of the GAO and a private consultant, the Commission's staff analyzed all the information received by the Commission. Commission staff telephoned and met with Air Force officials throughout the process, checking information and responding to questions or disputed data submitted by Members of Congress and the public. Like the GAO, the Commission was permitted full access to all of the information used by the Air Force. **cite AF decl;** Courter Decl. ¶ x. Commissioners and Commission staff also met repeatedly with the plaintiffs and others who opposed Loring's closure, and considered voluminous information they submitted disputing the Air Force's conclusions concerning Loring. After considering all of this information, the Commission voted 5-2 to uphold the Secretary of Defense's proposal to close Loring.

5. The President's Decision And Congress's Approval

The President subsequently approved this recommendation, ordering that Loring and ~~19~~ 18 other Air Force Bases be closed or realigned. Resolutions to overturn President Bush's decision were introduced in both Houses of Congress. The House disapproval resolution was defeated 364-60. 137 Cong. Rec. H6006-39 (daily ed. July 31, 1991). The Senate Armed Services Committee reported unfavorably on a similar resolution, and also held several hearings at which issues related to Loring were discussed

in great detail. However, because the House had already voted down a resolution on which both chambers would have had to agree, the Senate resolution was never voted upon by the full Senate.

ARGUMENT

I. THE AIR FORCE MADE AVAILABLE TO THE GAO AND THE COMMISSION ALL INFORMATION ON WHICH IT RELIED IN RECOMMENDING BASES FOR CLOSURE

Plaintiffs' remaining claim against the Air Force is that the Air Force failed to provide to GAO and to the Commission all information the Air Force used in developing its closure and realignment recommendations. See Amended Complaint ¶¶ 67, 68(A); § 2903(c)(4).[8] Even if the Court could reach these claims as a matter of law, see infra pp. - 26 --- 35 -, the facts do not support plaintiffs' allegations.

A. The Air Force Provided All Information Used In Making Its Recommendations To The GAO

Ever since publishing its report analyzing the military services' base closure processes, the GAO has consistently maintained that the Air Force fully cooperated in making information available and responding to issues GAO raised. Contacts between the Air Force and GAO began shortly after the Act became

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[8] Plaintiffs also contend that the President's decision to close Loring must be overturned because the Secretary of the Air Force did not "supply" all information used in formulating its recommendations to Congress, and insist that this failure also violated § 2903(c)(4). See Amended Complaint ¶¶ 67, 68(A). Even if plaintiffs could substantiate this claim, however, there is no provision in the Act that requires the Air Force to provide any information concerning its recommendations to Congress. Section 2903(c)(4) obligates the Air Force only to provide information to the Commission and to GAO.

law on November 5, 1990, and continued throughout the process. **AF decl.** The GAO's report is replete with approval for both the Air Force's base closure recommendation procedures and the open communications between the two agencies. The report finds that the Air Force's conclusions are well documented, GAO Report at 3, 4; that the procedures the Air Force adopted were reasonable, id. at 35; and that the Air Force's decisions treated all bases equally and were based upon the relevant criteria, id. at 42. In its conclusion, GAO summarized its satisfaction with the Air Force's process and cooperation with GAO's inquiries:

> The extent to which we could track and assess the process followed by the services was highly dependent on (1) the documentation made available to us, (2) the extent to which the materials used in the process had been checked and verified, (3) the access we had to the process and the officials who participated in the process, and (4) the time available. For example, the Army and the Air Force made extensive materials on their decision process available to us and used their internal audit agencies in implementing their processes. We were also able to discuss the process as it was being conducted and after it was finished with numerous officials involved at all levels of the Army and Air Force decision-making chain, which facilitated our evaluation.

Id. at 64.

In the year since the report was published, GAO's view has not wavered. GAO maintains that the Air Force provided all of the information it considered, and that GAO was fully able to fulfill its statutory role of reviewing and evaluating the Air Force's process. See Declaration of Robert L. Meyer ¶¶ 2-4.

Searching for some information that GAO may have overlooked, plaintiffs seize upon the fact that SAC, on which the Air Force relied for information about strategic bases, differed with Air

Force officials at Loring and Plattsburgh over the condition of and projected costs to upgrade certain facilities at those bases. Plaintiffs have decided that the bases had the more appropriate figures on these elements, and contend, at least implicitly, that the Air Force failed to bring the "correct" data to GAO's attention. Of course, the substantive claim that the Air Force relied on inaccurate information in reaching its base closure recommendations has been dismissed. Plaintiffs cannot prevail on their remaining claim unless they can demonstrate that the Air Force denied GAO access to information the Air Force actually used, whether erroneous or not.

On this narrower point, there can be no dispute. The statute requires the Air Force to make available to GAO only the information "used by the Department in making its recommendations to the Commission." § 2903(c)(4). As plaintiffs must concede, the Air Force's recommendations concerning Loring and Plattsburgh relied only on information provided by SAC, not the figures now offered by the plaintiffs. **cite AF decl** The Air Force fully complied with the statutory requirement, making available to GAO all of the information it used in developing its recommendations.

In any event, GAO was aware of the differing estimates of various bases' facilities. Meyer Decl. ¶ **x**. And although GAO did not determine the precise dollar amounts of these discrepancies, that result was not because the Air Force refused to provide the information, but because GAO itself determined that there was no need to resolve these minor issues. The Air Force's

detailed procedure examined over eighty separate sub-elements, and GAO quite reasonably determined that an occasional error on a few of these items would not significantly alter the Air Force's conclusions. Id. ¶ x.

B. The Air Force Made All Information Available To The Commission

The Commission was also satisfied that the Air Force made available all information on which the Air Force recommendations were based. See Courter Decl. ¶ x. Throughout the process, as the Commission staff responded to questions from the Commissioners, or received new information from Congress and the public, Commission staff repeatedly contacted the Air Force for additional information. All of those requests were answered in a timely and complete manner. See id.

As with the GAO, any discrepancies in condition of and cost to upgrade facilities are irrelevant in this case, because the alternative figures offered by the plaintiffs were not "used by the Department." § 2903(c)(4). However, the record is also clear that the plaintiffs were well aware of the alleged discrepancies, and fully aired their views on these issues before the Commission, providing extensive data concerning Loring's facilities. Commission staff considered those submissions, requested more information from the Air Force, and revised their estimates. See, e.g., **hearings** at 46-49 (response of Commission staff to information provided by Sen. Mitchell), 50-94 (detailed report provided by plaintiffs to the Commission concerning Loring).

The plaintiffs apparently also contend that the Air Force

failed to make available to the Commission information concerning the Air Force's consideration of "quality of life." As an initial matter, the Air Force consistently maintained, and contends today, that "quality of life" played no role in its ultimate recommendations. **cites.**[9] However, the Air Force's attempts to consider "quality of life," which failed because the Air Force could not find an accurate method to measure it, were fully explained to the Commission. The minutes of the Base Closure Executive Group meetings, which document the unsuccessful effort to include this factor, were made available to the Commission the day DOD's recommendations were published. **cite AF decl.** The only time the Air Force mentioned the issue to the Commission was during a classified briefing on June 6, 1991. At that meeting, Air Force Brig. Gen. (then Col.) Charles Heflebower told the Commissioners that although SAC felt strongly that quality of life should play a role in base closure decisions generally, the Air Force had been unable to measure it accurately, and therefore had not considered it. **cite transcript.** Plaintiffs' substantive objections to consideration of "quality of life" have been

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[9] The only evidence that the Air Force did consider "quality of life" is GAO's Report, which states that the Air Force informed GAO that that factor, among several others, would play a role in deciding whether to recommend closure of Loring. See GAO Report at 40-41. The Air Force did not make such a statement to GAO, and the Report is in error on this point. **cite AF decl.** The Court has dismissed challenges to the substantive basis of the Air Force's recommendations, however, and the issue of whether the Air Force actually considered "quality of life" is no longer relevant to this case. Thus, the inconsistency between GAO's and the Air Force's position creates no genuine issue of material fact precluding summary judgment.

dismissed, and they simply cannot demonstrate that the Air Force withheld information from the Commission on this or any other topic. Paragraphs 67 and 68(A) of the Amended Complaint must be dismissed.

II. THE COMMISSION FULLY COMPLIED WITH THE REQUIREMENTS OF THE ACT

A. The Act Does Not Prohibit The Commission From Receiving Information After The Close Of Public Hearings

The Act assigns the Base Closure Commission an enormous task: to develop independent recommendations for closure of Army, Navy, and Air Force bases across the country, based on a comprehensive review of all available information, from all interested parties, in just ten weeks. To ensure the most informed recommendations possible in that short time, the Act imposes no limitations on the means the Commission may use to gather data and opinions. The statute does not, for example, burden the Commission with formal trial-type procedures, nor itemize methods by which the Commission may collect information.

The only provision in the Act concerning public hearings simply provides that "the Commission shall conduct public hearings on the [Secretary of Defense's] recommendations" after receiving them on April 15, 1991. Section 2903(d)(1). The Act does not specify how many hearings must be held, what subjects must be considered, or when the hearings must occur during the process. Nor does the Act require that all information received by the Commission must, at some point, be reviewed in a public

hearing.[10]

In compliance with this flexible requirement, the Commission conducted twenty-eight public hearings in nine weeks, both in Washington, D.C. and at regional sites throughout the nation, to obtain information and opinions from citizens, their elected representatives, the military, the GAO and countless other persons and organizations. See Commission Report, Appendix G. Plaintiffs can hardly contend that the Commission's punishing schedule of conducting public hearings across the country on the average of every three days somehow violated the Act.

Rather, the plaintiffs complain that the Commission, or its staff, obtained some unspecified information from the Air Force in the final week between the last regional hearings and the Commission's final deliberations.[11] See Amended Complaint

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[10] The only other requirement the Act imposes on the Commission's analysis is that each meeting of the Commission, other than those in which classified information is discussed, be open to the public. See § 2903(e)(2)(A). The Commission scrupulously followed this requirement; indeed, all but one of the meetings of the seven-person Commission were shown on C-SPAN. See Declaration of Jim Courter ("Courter Decl.") ¶ 2.

The Act did not require meetings of Commission staff to be open to the public. Cf. National Anti-Hunger Coalition v. Executive Committee of the President Private Sector Survey on Cost Control, 557 F. Supp. 524, 529 (D.D.C.) (task force or staff to committee are not subject to open meeting requirements of the Federal Advisory Committee Act, 5 U.S.C. App. 2, § 10), aff'd, 711 F.2d 1071 (D.C. Cir. 1983). Nonetheless, consistent with its policy of openness, the Commission unanimously determined that Members of Congress or their staffs could attend the meetings if they requested to do so. None did. Courter Decl. ¶ 3.

[11] The last of the regional hearings were held on June 21, 1991 in Texas and Mississippi. See Commission Report, Appendix G. The Commission's final deliberations, which were also open to the public, were held on June 27, 28, and 30, 1991. Id.

¶ 70(b). While true, there is simply no requirement in the Act that the Commission discontinue its efforts to obtain, or refuse to receive, information from any military service, or from any citizen, or their elected representatives, at any time in the process. Under the constricted timetable established by the Act, Congress could not have intended the Commission to call a hearing every time an additional fact or argument relating to a military installation was presented to the Commission. Nor does any provision in the Act guarantee the public an opportunity to comment on every piece of information the Commission considers.

Instead, apart from requiring that the Commission hold some public hearings and that the Commission's meetings be public -- requirements that have indisputably been satisfied -- Congress gave the Commission broad discretion in structuring its information gathering and analysis efforts. The Commission quite reasonably used a wide range of both formal and informal procedures to accomplish that task. In addition to formal receipt of information in public hearings and from the military services, the Commission also relied heavily on a policy of almost unmitigated openness. The public and its political representatives were extended an open invitation to provide information in face-to-face meetings, correspondence, or even telephone calls to Commissioners and their staff. The public was also free to visit the Commission's offices and review and comment upon all of its unclassified information, at any time until the Commission's final deliberations were completed on June 30, 1991. Indeed, the

Commissioners even accepted and considered notes passed to them during recesses in the final deliberations. See Courter Decl. ¶ 7.[12]

Thus, the plaintiffs' implicit claim that they were unable to comment on material received by the Commission from the Air Force after the close of public hearings is simply inaccurate. Even if true, however, acceptance of information not reviewed at a public hearing would not have violated the statute. The public hearings were not the only opportunity plaintiffs had to offer the Commission their views. See id. ¶¶ 6-7, 9(a)-(n). The plaintiffs were free to review and copy unclassified documents in the Commission's files, received from the Air Force or any other source, at any time, whether before or after June 21, 1991. Id. Plaintiffs frequently commented on Commission materials and offered responsive information to individual Commissioners and Commission staff, Courter Decl. ¶ 8, and could have done so until the final deliberations concluded.[13] Thus, even if the plaintiffs could establish that the statute guaranteed the public an opportunity to comment on all information the Commission re-

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[12] The public took full advantage of this opportunity. Overall, the Commission received over 143,000 letters and more than 100 phone calls per day in the ten weeks in which it conducted its review. Courter Decl. ¶ 8.

[13] Surely plaintiffs do not mean to suggest that, when individual Commissioners and staff members met with the plaintiffs to receive additional information, analysis and argument -- as they did on eleven separate occasions, not counting the correspondence and phone calls exchanged almost daily concerning Loring, see Courter Decl. ¶ 9 -- the Commission violated the Act, or that the statute required information received in these informal meetings to be reviewed at a public hearing.

ceived, the Commission plainly permitted such scrutiny. Any suggestion that plaintiffs were somehow unable to rebut or supplement information provided by the Air Force after June 21 is totally disingenuous, and any argument that the Commission was required to hold a public hearing to hear their criticisms is legally unsupportable.

In short, the Commission and its staff did obtain additional information from the Air Force, as well as from plaintiffs, that was not reviewed at a public hearing. See Courter Decl. ¶ 10. The Commission would have been derelict in its responsibility to provide the best possible recommendations to the President if it refused to accept helpful information from any source at any time. The Commission's tireless efforts to gather relevant data violated no provision of the Act.

B. All Information On Which The Commission Relied Was Made Available To The Public

Plaintiffs next contend that the Commission considered information not "made available to the GAO or to Congress." Amended Complaint ¶ 70(a). Presumably, plaintiffs charge that the Commission considered information that it had failed to make available to GAO and Congress.[14] In particular, plaintiffs ap-

[14] The Amended Complaint could also be read to claim that the Commission violated the Act by considering information that the Air Force had failed to make available to GAO and Congress. That claim, too, is flawed. The Air Force supplied to GAO and the Commission all information used in making its recommendations. See Meyer Decl. ¶ 2; Courter Decl. ¶ x. Even if it had not done so, however, it would not violate the Act for the Commission to accept information that the Air Force had failed to provide to GAO. Indeed, the Act specifically contemplated that the Commission might consider information that GAO had not

parently claim that the Commission considered "quality of life" in deciding to close Loring, a factor they believe was not adequately discussed in public. However, there is neither a legal basis for such a claim, nor any factual support for it.

As a threshold matter, there is no legal requirement that the Commission make available to GAO and Congress all information on which it relies. The Act does not mention GAO at all as a recipient of information from the Commission; GAO's process concludes on May 15, when it submits its report. Aside from a few selected Committee Chairpersons, ranking minority members, and their designees, see § 2902(e)(2)(b), the Act does not provide that Members of Congress generally may review the Commission's information during the process. The statute requires only that the Commission make information available to Congress, upon request, after the Commission makes its final recommendations to the President on June 30. § 2903(d)(4). In fact, the Commission opened its files and accepted information and comments from all interested parties throughout its process, but the Act did not require it to do so.

Second, plaintiffs' challenge to the consideration of quality of life misconceives the facts. The record demonstrates

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received: a crucial part of GAO's role was to provide the Commission an analysis of the Air Force's process, as a starting point from which the Commission could conduct further proceedings and gather more information to understand and evaluate the Air Force's recommendations. Similarly, the Act does not forbid the Commission from considering information the Air Force failed to provide to Congress; the Act does not require the Air Force to provide any information, at any time, to Members of Congress, but only to GAO and the Commission. See § 2903(c)(4).

that the Commission did not consider "quality of life" in voting to recommend closure of Loring. The only significant reference to "quality of life" during the Commission's process was at the final session on June 30, 1991, when Commissioner Duane H. Cassidy stated his belief that "quality of life" was the only way to distinguish between Loring and Plattsburgh. **cite transcript.** No other Commissioner responded to this suggestion, however. The rest of the long discussion concerning Loring and Plattsburgh considered a number of other factors: the amount of usable ramp space and the significance of the different ramp configurations at Loring and Plattsburgh; the possibility of closing both bases; the relative distance of each from primary tanker routes, and the significance of those factors. **cite.**

In fact, there is specific evidence that a number of Commissioners did not consider "quality of life." Commissioner Ball, who voted to recommend retaining Loring, stated during the deliberations that he believed the two bases to be closely ranked on several measures, but that he valued Loring's strategic location. See **transcript** at 454, 461-62, 474. Both Chairman Courter, who voted to recommend keeping Loring open, and Commissioner Levitt, who voted to recommend closure of the base, later testified at a hearing of the Senate Armed Services Committee that "quality of life" had played no role at all in their decision.[15] Indeed, Chairman Courter characterized Commissioner

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[15] See **hearings** at 95 (statement of Commissioner Levitt) ("[Quality of life] had nothing to do with my decision. Nor do I think it had very much to do with the decision of a number of

Cassidy's remark as "a gratuitous statement by a [C]ommissioner that indicated how he felt about it," and flatly stated that "we did not discuss quality of life." **Hearings** at 188.

Second, even if the Commission had based its recommendation to close Loring on "quality of life," the legality of which is no longer at issue, all information the Commission received on that subject was made available to the public, including the plaintiffs. Defendants are aware of only two occasions on which the Commission received information about "quality of life" at Loring: the June 6, 1991 meeting with the Air Force, in which then-Col. Heflebower stated that the issue was generally important to SAC, and the public regional hearing in Boston, Massachusetts on May 22, 1991, in which a number of speakers spoke favorably about the quality of life at Loring.

Plaintiffs have characterized the brief mention of "quality of life" during the final deliberations as a surprise, and have objected that they would have presented more information to the Commission had they known the issue would emerge. See, e.g., **hearings** at 187 (statement of Sen. Cohen). However, plaintiffs have never contended that they were denied access to any information the Commission received during the process. Plaintiffs'

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other commissioners who voted as I did. . . . [T]he arguments made in terms of the military importance of retaining Loring were not persuasive."); id. at 96 (statement of Chairman Courter) (voted to "keep Loring from closure, not on quality of life at all, but based on the argument that . . . there was substantial deviation in some of the stated criteria"); id. at 189 (the other Commissioners "have independent minds and they made their own independent judgments, and I do not think they were swayed by one statement of one Commissioner on one facility").

arguments that the Commission improperly considered "quality of life," and that they never had an opportunity to present their views on the subject, are inaccurate, and fail in any event to state a violation of the Act. Paragraph 70(a) of the Amended Complaint must therefore be dismissed.

C. The Commission Did Not Consider A "New" COBRA Model At Its Final Meeting

In their only specific allegation that the Commission considered information not made available to the public, plaintiffs contend that, at its final meeting on June 30, 1991, the Commission considered "new data pertaining to potential cost savings based upon a new COBRA model" that had not previously been disclosed. See Amended Complaint ¶ 64(d) (emphasis in original). This contention is simply incorrect as a matter of fact and, even if true, could not possibly have injured the plaintiffs.

One of the factors considered by the Air Force and the Commission was potential cost savings, which included consideration of the cost to close the base, the annual savings that would result from closure, and the time it would take to recover the costs of closure (the "payback period"). **GAO Report, Comm'n Report.** The estimated savings for each base were based on a computer model known as "COBRA," an acronym for "Cost of Base Realignment Actions."

Near the end of the June 30 meeting, as the Commission turned to consideration of strategic Air Force bases, Commission staff pointed out to the Commissioners a discrepancy in some of

the data concerning cost savings. One set of figures was based on the Air Force's original model, an early version of COBRA that was based on the generic assumption that, when a base was closed, all of its forces had to be moved to some other fictitious base located 1500 miles away. The Air Force used that general model because, at the time it was developing closure options, the Air Force did not know precisely which bases would close or where forces from those bases would move, but wanted to include potential savings as a factor. Using this model, the Air Force estimated that closure of Loring would result in annual savings of $66.6 million, and that the "payback period" would be one year.

A second COBRA model, used by the Department of Defense, was more specific, basing its cost calculations on the actual moves of forces that would be necessary when particular bases were closed. In the case of Loring, for example, the Air Force model had calculated savings based on the assumption that Loring's forces would move 1500 miles away, whereas the DOD model based its figures on the fact that closure of Loring would require relocation of its B-52 bombers to K.Y. Sawyer Air Force Base, in Michigan, and dispersal of Loring's KC-135 tankers to other bases. This more accurate model still projected a one-year payback period for Loring, but estimated that the annual savings would be only $61.8 million.

Plaintiffs suggest that the "new" estimate, based on the more accurate DOD model, suddenly appeared for the first time in the Commission's final meeting, and complain that they were not

permitted an opportunity to comment on its accuracy. In fact, however, the DOD model and its $61.8 million estimated annual savings for Loring, on which the Commission relied, had long been a matter of public record: it was the figure reported in the Secretary of Defense's original recommendations, published months earlier, at the very beginning of the Commission's process. See 56 Fed. Reg. 15184, **xxx** (April 15, 1991). Further, the COBRA models and all data generated using those models were available for public inspection and comment at the Commission's offices at any time. See Courter Decl. ¶¶ 3-7, 11. Plaintiffs thus had a full opportunity to comment on the accuracy of the savings estimate, notwithstanding the fact that another, less accurate model also appeared and was rejected in the final deliberations.

Furthermore, even if the DOD model had not been subject to public scrutiny, that minor error would provide no basis for overturning the Commission's recommendation concerning Loring. The DOD model to which the plaintiffs object actually projected smaller savings than the Air Force model, by some $480,000 per year. If anything, therefore, the "new" data weighed against Loring's closure, and plaintiffs were hardly prejudiced by the Commission's adoption of a more conservative estimate.

III. THE COURT SHOULD RECONSIDER ITS RULING ON THE MOTION TO DISMISS IN LIGHT OF RECENT AUTHORITY FROM THE SUPREME COURT

Under the Act, as defendants have argued, neither the Air Force nor the Commission has any authority to order the closure of any base. Instead, those agencies merely compile a list of

recommendations, which the President is then free to accept or reject for any reason. § 2903(e). The Act gives the President wide discretion in reviewing the Commission's proposals; indeed, if the President chooses, he may decide not to close any bases in a given year, in which case the base closure process would simply end. § 2903(e)(5).

For these reasons, defendants argued in their motion to dismiss that the recommendations of the Air Force and the Commission are not reviewable under the Administrative Procedure Act, because there is no "final agency action" to review. 5 U.S.C. § 704.[16] The only decision that had any impact on the plaintiffs was the President's, and that decision is not reviewable. Specter, slip op. at 23-24.

The Court did not specifically address this argument in its May 20, 1992 opinion, denying in part the defendants' motion to dismiss, but adopted the Third Circuit's reasoning in Specter that the Court could conduct a limited review of the defendants' actions even though the President's decision is not reviewable. However, the Supreme Court has now held, in a decision issued after the Third Circuit's Specter ruling and in indistinguishable circumstances, that there is no "final agency action" to review when an administrative agency simply makes recommendations to the

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[16] See also H. R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258 ("no final agency action occurs in the case of the various actions required under the base closure process contained in this bill"); Specter v. Garrett, slip op. at 19 ("The actions challenged here are not 'agency actions' as usually encountered under the APA.").

President, who then makes the actual decision and transmits it to Congress. Franklin v. Massachusetts, No. 91-1502 (slip op. June 26, 1992), 1992 U.S. Lexis 4531, attached as Exhibit x. Therefore, this Court should reconsider its decision and conclude that there is no "final agency action" subject to judicial review in this case.

In Franklin, the State of Massachusetts challenged the method used by the Secretary of Commerce for including in the census federal employees serving overseas. The Secretary decided to count these employees as residents of their "home of record," which altered state populations enough to shift a Representative from Massachusetts to Washington. 1992 U.S. Lexis at *9-*13.

The statutes at issue require the Secretary of Commerce to conduct the census and transmit the figures to the President. See 13 U.S.C. § 141(b). After receiving the figures, the President then transmits them to Congress, along with the number of Representatives to which each state is entitled, which is derived through a mathematical formula dictated by statute. See 2 U.S.C. § 2a(a). Although the President's role is largely "ministerial," 1992 U.S. Lexis at *21, the President is technically free to require further actions by the Secretary. This scheme is closely analogous to the process established by the Base Closure Act, which requires the Commission to develop recommendations, after which the President makes a decision. In this case, in fact, the President has an even more significant role; rather than just the "ministerial" transmission of information to Congress, the Act

specifically provides that the President may accept the list of recommendations, return the list to the Commission for revision, or do neither. See §§ 2903(e)(3)-(5).

In Franklin, the Supreme Court held that there is no "final agency action" subject to APA review in these circumstances, because the agency's report to the President "serves more like a tentative recommendation than a final and binding determination." 1992 U.S. Lexis at *18. The Court explained that the existence of reviewable agency action turns on whether the agency has completed is process and "whether the result of that process is one that will directly affect the parties." Id. at *16. The Court held that because the Secretary's report was transmitted to the President, and not directly to Congress, the only action that changed the apportionment of Representatives was the President's statement to Congress. The intermediate report from the Secretary "is, like 'the ruling of a subordinate official,' . . . not final and therefore not subject to review." 1992 U.S. Lexis at *19 (citations omitted). Because the President is not subject to the APA, the Court concluded, the method of allocating overseas federal employees was not subject to judicial review at all under that statute. 1992 U.S. Lexis at *23-*24.

The Supreme Court also rejected the contention that, as a practical matter, the President's decision was little more than a relaying of the Secretary's figures, using language equally applicable to decisions under the Base Closure Act: "[t]hat the final act is that of the President is important to the integrity

of the process and bolsters our conclusion that his duties are not merely ceremonial or ministerial." 1992 U.S. Lexis at *22-*23. The President's explicit role under the Base Closure Act was also a purposeful decision, vital to the "integrity" of a concerted statutory effort to foster political consensus between the Executive and Legislative branches. Indeed, the involvement of the President carries even greater weight here, because in base closure decisions the President does not act merely pursuant to statutory powers delegated by Congress, as in Franklin, but under his constitutional authority as Commander-In-Chief.

The Franklin decision is squarely applicable in this case. Like the Secretary of Commerce, neither the Air Force nor the Commission takes any action that "will directly affect the parties." Rather, the defendants simply generate a list of suggestions; the President is the one who decides whether bases will be closed.

Indeed, in Franklin, there was no statute that authorized the President to reject the Secretary's census figures; the Court simply noted that Congress had not prohibited the President from exercising his discretion. Here, of course, the Act specifically permits the President a number of options, ranging from total acceptance to total rejection of the Commission's recommendations, and that explicit grant of decisionmaking authority makes the case even stronger that the action plaintiffs challenge here is the President's, not the defendants'. In Franklin, the President was not free to declare that the census shall not be

taken, but the Base Closure Act authorizes him to decide that no military bases will be closed. In light of Franklin, therefore, the Court should reconsider its May 20, 1992 decision, and dismiss all counts of the Amended Complaint.

IV. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THIS COURT CANNOT AFFORD MEANINGFUL RELIEF FOR ANY VIOLATIONS OF THE ACT THAT PLAINTIFFS MIGHT PROVE

Unlike remedies at law, the courts have "broad discretionary power" to grant or withhold injunctive or declaratory relief: "equitable remedies are a special blend of what is necessary, what is fair, and what is workable."[17] The Third Circuit's decision in Specter reaffirmed this principle. Although opining that sharply limited review of base closure decisions is permitted, the court repeatedly expressed doubt that the courts could or should take any action to correct a violation of the Act: "such a finding, if and when made, will not necessarily mandate judicial relief." Slip op. at 32.[18] Instead, "[w]hether or not a violation receives a remedy is something that a court must determine through an exercise of discretion." Id. at 32. This Court explicitly adopted the same caveat in its May 20, 1992

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[17] Lemon v. Kurtzman, 411 U.S. 192, 200 (1973); see also id. at 201 ("[i]n equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests").

[18] See also id. at 32-33 ("judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from step one"); id. at 40 ("we do not decide that the Act [was violated] or that a remedy is available under the circumstances of this case even if it [was]").

opinion. See slip op. at 12.

The Court's hesitation was fully justified. The remedy plaintiffs seek completely ignores the statutory scheme. Moreover, it would permit plaintiffs to do indirectly what they concededly cannot do directly: overturn a complex, discretionary military decision expressly made by the President and Congress, with the advice of a Commission that in practice no longer exists. This Court should therefore decide the issue that both Specter and the previous opinion in this case left open, and conclude that no judicial remedy is available for any "technical defalcations" that the plaintiffs might eventually prove.[19]

A. Plaintiffs' Proposed Remedy Would Fatally Undermine The Statutory Scheme

Plaintiffs primarily request that the Court vacate the President's and Congress's decision and remand the Loring closure issue to the Commission. Struggling to reconcile this proposal with the statutory scheme, plaintiffs argued in an earlier memorandum that the Commission "continues to be a legally existing administrative entity," despite the fact that all of the

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[19] Yet another difficulty in awarding plaintiffs any relief is that no court has determined the relevant standard: are the plaintiffs entitled to a judicial reversal of the President's decision if they demonstrate that any information "used by the Air Force," no matter how technical or irrelevant, was not provided to GAO or the Commission? Or are they required to demonstrate, under a "harmless error" analysis, that GAO would have withheld its approval and the Commission would have voted to recommend keeping Loring open had these agencies known of the missing information? There is simply no source from which the Court might determine what level of "technical defalcation" warrants judicial relief.

members of that Commission have returned to private life.[20] Plaintiffs circumvent the fact that there are currently no Commissioners to review the Loring recommendation by suggesting that the Court simply wait, and eventually require the new members of the 1993 Commission, when they are appointed, to take up the issue.[21] Apparently, the 1993 Commission would be required to reconsider the Secretary of Defense's 1991 recommendation even if the Secretary did not again propose Loring for closure as part of the 1993 process.

Plaintiffs' novel proposal is inconsistent with numerous provisions of the Act. First, despite plaintiffs' insistence that the Commission technically exists continuously until 1995, as a practical matter there are three separate Commissions, permitted to meet only in calendar years 1991, 1993, and 1995, each composed of entirely different members (except the Chairman, who serves "until the confirmation of a successor"). See

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[20] Plaintiffs' [Second] Supplemental Memorandum In Opposition To Defendants' Motion To Dismiss ("Pls' Mem.") at 3. The current Chairman of the Commission, Jim Courter, alone continues to serve as Chairman until his successor is appointed, but even he no longer has authority to take any action concerning the closure of bases. See § 2902(d)(2).

[21] Plaintiffs argue that such a procedure must be permissible, because they cannot locate a case requiring that the same agency officials who made a decision participate in reconsideration. See Pls' Mem. at 5. Of course, plaintiffs also cannot locate a case in which the governing statute requires that every agency official be replaced each time the agency makes a recommendation. As defendants have argued, Congress purposely established a unique procedure for base closure because standard administrative mechanisms had consistently failed. Plaintiffs' attempt to shoehorn the peculiar statutory provisions here into the traditional administrative mold is plainly at odds with Congress's intent.

§§ 2902(c)(1)(B), (d), (e)(1). Those Commissioners are not empowered to reconsider the President's decision from earlier years, but only to review the recommendations submitted by the Secretary of Defense for the year that Commission sits, and to assess those recommendations under the force structure plan submitted to Congress for that year. See § 2903(d). The Commission must perform these functions within strict time constraints. See § 2903(d)(2)(A).

The Act specifically forbids the closure of bases except under the carefully structured procedures set out in the Act for each of the three base closure rounds. See § 2909(a). The Act also requires that the President and Congress consider the Commission's final list of recommendations as a whole, not debate the merits of closing an individual base. See §§ 2903(e), 2908. Plaintiffs' proposed remedy would permit supporters of individual bases to have their local institution thrown back into the process for more consideration in later years than other bases received.

Further, a decision that courts may reverse or remand base closure decisions from earlier rounds, as a practical matter, would undermine the entire process. The Secretary of Defense cannot sensibly select bases for closure or realignment in 1993 if the status of bases ordered closed in 1991 remains in doubt.

In short, nothing in the statute suggests that Congress intended any link between the three separate rounds of base closure, or that the Act was designed to allow for overlap in the

work of the three Commissions. To the contrary, every provision governing the Commission's composition and duties, as well as consideration by the President and Congress, mandates a strict separation between the three sessions. Plaintiffs' proposed remedy is fundamentally at odds with the scheme established by Congress for base closure, and the Court should therefore hold that judicial relief is unavailable.

B. Plaintiffs' Proposed Remedy Violates Separation Of Powers Principles

More fundamentally, plaintiffs' suggestion that an injunction in this case requires no more than a simple remand to the agency ignores the practical effect of the relief they request. In the usual case, remand of an administrative decision does no more than invalidate the agency's work, and requires that agency to correct its own mistakes. In contrast, requiring a new Commission to reconsider Loring's closure, and presumably to submit that new recommendation to the President and Congress for review, effectively invalidates the President's and Congress's considered 1991 decision that Loring should be closed. Thus, despite their protestations that they challenge only the Commission's actions, plaintiffs do not simply ask that the Commission be required to correct its alleged mistakes; they effectively demand that the President and Congress revisit their decisions.[22]

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[22] At most, plaintiffs' complaint amounts to an insistence that the President and Congress received flawed advice in making decisions that rest entirely within their discretion. In any event, as the exhaustive detail of the Senate's hearings reveals,

Granting plaintiffs the remedy they request therefore presents serious separation-of-powers issues, even though the Court has determined that judicial review itself, in some limited circumstances, does not. Had the plaintiffs directly named the President and Congress as defendants, this Court undoubtedly would not have entertained their challenge; yet granting the relief plaintiffs request just as surely "would require this Court, in effect, to substitute its judgment for that of the [President], the House Committee, and the House of Representatives. This the Court cannot and should not do." Barkley v. O'Neill, 624 F. Supp. 664, 668 (S.D. Ind. 1985).

This challenge to the President's and Congress's decision is even plainer in the second portion of plaintiffs' memorandum, in which they urge the Court "to reverse the decision of the Commission without remanding the matter."[23] Again, no decision was made by the Commission; the decision plaintiffs request the Court to discard is the President's. Even the Third Circuit did not imply that this extreme relief would be justified, holding that "any remedy afforded in this case would be limited to requiring further process in accordance with the provisions of the Act." Slip op. at 33. Any remedy that would address plaintiffs' claims

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Congress approved the President's decision with full knowledge of all the alleged flaws in the defendants' consideration of Loring. See generally **cite hearings.**

[23] Pls' Mem. at 5. Plaintiffs later express some apparent hesitation at the breadth of their request: "the exigencies of the case at bar warrant that the decision of the Commission be reversed [?]." Id. at 7.

would necessarily require the Court to confront directly the decision made by coordinate branches of government, and the Court therefore should hold that no remedy is available.

C. The Court Should Exercise Its Remedial Discretion To Deny An Equitable Remedy

Finally, the Supreme Court has repeatedly held that, because equitable remedies are committed to the court's discretion, courts may withhold injunctive relief where its award would upset settled expectations and would be contrary to the broad public interest. See, e.g., Heckler v. Matthews, 465 U.S. 728, 745 (1984); Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam); Felton v. Secretary, United States Dept. of Education, 787 F.2d 35 (2d Cir. 1986); Franklin Savings Assn. v. Director, Office of Thrift Supervision, 740 F. Supp. 1535, 1542 (D. Kan. 1990). That doctrine is plainly applicable here, where the plaintiffs' invitation to invalidate Presidential decisions threatens to undermine delicate political compromises in the sensitive area of national defense policy.

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment should be granted.

Respectfully submitted,

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No. 93-289

In The

Supreme Court of the United States

October Term, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, *et al.*,

Petitioners,

v.

ARLEN SPECTER, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the President has authority under the Defense Base Closure and Realignment Act of 1990 (the "Act") to order closure of domestic bases absent a valid list of closures submitted by the Base Closure Commission? (Answered in the negative by the court of appeals).

2. Whether the President's "accept all-or-nothing" limited involvement under the Act immunizes from judicial review base closure conclusions that were the product of a flawed and unfair administrative process? (Answered in the negative by the court of appeals).

3. Whether the strong presumption that acts of Congress are subject to judicial review applies where: (a) the express "purpose" of the Act is to provide a "fair process" for base closures; (b) there is no statutory language denying review; (c) the base closure process was flawed; and (d) construction of the Act to preclude judicial review would render it a complete nullity? (Answered in the affirmative by the court of appeals).

4. Whether federal courts have jurisdiction to review deliberate violations of the "fair process" expressly declared to be the "purpose" of the Act when there is no other way to ensure compliance with mandatory statutory safeguards? (Answered in the affirmative by the court of appeals).

5. Whether there is "final" agency action within the meaning of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), after: (a) the Base Closure Commission has submitted its all-or-nothing list to the President, who, within 15 days, accepts it in its entirety – as he must if there are

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED – Continued

to be *any* base closings for the year; (b) the House – after the *maximum* of two hours' debate – fails to pass a resolution of disapproval within 45 days; and (c) the Secretary of Defense begins to close and realign military bases? (Answered in the affirmative by the court of appeals).

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COUNTERSTATEMENT OF THE CASE

As Judge Stapleton of the Third Circuit observed at oral argument, the issues in this case go to the very core of the Republic. Petitioners' argument that there is no judicial review of their deliberate refusal to follow mandatory procedural safeguards of the Base Closure Act would permit the President unilaterally to nullify the will of Congress.[1]

Petitioners' egregious violations of the Act in rigging the decision to close the Philadelphia Naval Shipyard (the "Shipyard") constituted nothing less than outright *fraud*. By preventing the most knowledgeable Navy officers from testifying before the Base Closure Commission (the "Commission"), concealing critical Navy documents opposing closure of the Shipyard, holding closed meetings instead of public hearings[2]

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[1] The Defense Base Closure and Realignment Act of 1990 ("Base Closure Act" or the "Act"), Pub. L. No. 101-510, 104 Stat. 1808, 10 U.S.C. § 2687 note (Supp. IV 1992) [reproduced at Pet. App. 98a-128a], expressly states that its "*purpose* . . . is to provide a *fair process*. . . . " § 2901 (emphasis added). On December 10, 1993, the Court of Appeals for the Second Circuit concurred with the Third Circuit's decision herein, holding justiciable allegations that the government "circumvented the base closure process by undertaking a [base] realignment . . . without submitting to the procedures specified" in the Act. *County of Seneca v. Cheney*, ___ F.3d ___, 1993 WL 504463, at pp. 1-2 & nn.2-3 (2d Cir., Dec. 10, 1993).

[2] Specifically, as alleged by Respondents, on December 19, 1990 and again on March 15, 1991, Admiral Heckman wrote memoranda to the Chief of Naval Operations, Admiral Kelso, urging the Navy not to close the Philadelphia Shipyard. Although Heckman was responsible for oversight of all Naval shipyards, the Navy refused to allow him to become a part of the base closure process. After his retirement from the Navy on May 1, 1991, Admiral Heckman was instructed by the Assistant Secretary of the Navy that he was *not* to testify before the Base Closure Commission at the public hearings on the Philadelphia Shipyard. In addition, a March 1991 memorandum from Admiral Claman, Commander Naval Sea Systems Command, to Admiral Kelso recognized that closure of the Philadelphia Shipyard's large drydocks would create a shortfall for the Navy in the event of an emergency. Despite repeated requests by interested members of Congress for all relevant information, the Navy deliberately withheld and

and cynically predetermining the fate of the Shipyard[3] by compiling a "stealth list" of closures before the statutory process even began, Petitioners decimated the procedural heart of the Act and the express intent of Congress to provide a "fair process."[4] [Amended Complaint, ¶220, at App. 54-55]. Petitioners' argument that their illegal acts cannot be reviewed by a court – at any level, in any jurisdiction or under any circumstances – would eviscerate the vitality of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and two hundred years of subsequent constitutional jurisprudence.

Respondents do *not* challenge the substantive merits of the decision to close the Shipyard; they seek only to invoke the historic role of the federal judiciary to "check and balance" a runaway bureaucracy which boldly has disregarded express Congressional mandates critical to a "fair process." To expose the Navy's fraud has required the unprecedented and herculean bipartisan efforts of several members of Congress and the pro bono contribution of a major Philadelphia law firm, together with the extraordinary efforts of the Shipyard workers, their unions, the Governors of Pennsylvania, New Jersey and Delaware and the City of Philadelphia and its Mayor.

Having never anticipated that their fraud would be exposed, Petitioners now resort to the extreme argument that

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fraudulently concealed the Claman and Heckman memoranda from the General Accounting Office ("GAO"), the Commission, Congress and the public until after the close of the public hearings. [Amended Complaint, ¶¶96-100, 129, 132-133, 170, at App. 29-30, 34-35, 43].

[3] *See* Amended Complaint, ¶185, at App. 45.

[4] Obviously stung by the widespread publicity of the Navy's alleged misconduct in the *U.S.S. Iowa* disaster and the "Tailhook" debacle, Petitioners lamely argue that the violations here were merely "routine" and "garden variety." [Petitioners' Brief (hereinafter "Brief") at 14, 34]. However, deliberate violations which go to the very heart of a statute designed to ensure "fair process" in the closure of domestic military bases – decisions that affect the "livelihood and security of millions of Americans" – are hardly "routine" or "garden variety." 56 Fed. Reg. 6374 (Feb. 15, 1991).

even the most brazen and deliberate violations of the Act are beyond judicial scrutiny.[5] *Not once* in their 48-page brief do they even attempt to explain how this over-zealous interpretation of the Act can be reconciled with its Congressionally declared purpose: "to provide a fair process." Such an interpretation not only cynically ignores the preeminent role of the federal courts as the protector of constitutional rights, but would effectively *repeal* the Act, the guiding purpose of which is to restore procedural integrity to the base closure process.

A. Statutory Background

The Act's express purpose is to ensure a "fair process" and thus eliminate the political machinations and secret deliberations that had pervaded base closure decisions under prior statutes.[6] The Act vests an independent commission, whose members must be confirmed by the Senate, with the authority to formulate an all or nothing package of bases to be closed – thus depriving both the executive branch and Congress of the discretion to close bases unilaterally. The magnitude of the powers delegated to the Commission makes it critical that the mandatory procedures for evaluating bases and formulating the base closure package are rigorously enforced. Without judicial review, all of the carefully crafted procedural safeguards would be rendered meaningless rhetoric.

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[5] In this case, the District Court dismissed the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, this Court must accept all of its well-pleaded factual averments of a flawed base closure process as true and view them in the light most favorable to Respondents. Fed. R. Civ. P. 12(b)(6); *Papasan v. Allain*, 478 U.S. 265, 283 (1986).

[6] There is much historical evidence suggesting that the executive branch has used base closings as a potent weapon to punish its political "enemies." *See* Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. Colo. L. Rev. 331 at n.13 (1991) (Nixon administration closed military bases in Massachusetts shortly after it was the only state to support McGovern in the 1972 presidential elections).

1. Congress first regulated the base closure process in 1966 by requiring the Department of Defense to provide it with 30 days' notice of any base closing. Pub. L. No. 89-188, § 611, 79 Stat. 793, 818 (1965). As conceded by Petitioners:

> During the 1960s and 1970s, successive Administrations sought to reduce military expenditures by closing or realigning unnecessary domestic bases. Because of the resulting economic dislocations in areas where bases were closed or realigned, the process encountered opposition from Members of Congress representing those areas. In addition, opposition to base closures was fueled in part by the perception that the Executive's selection of bases was influenced by improper political considerations. . . . To address those concerns, Congress in 1977 *enacted procedural restrictions on the Executive's authority* to close or realign the size of military bases.

[Brief at 2 (citations omitted) (emphasis added)].

2. Under the 1977 legislation, the Secretary of Defense was prohibited from closing a military base unless he had (1) notified the Armed Services Committees of both the House and Senate, (2) submitted an evaluation to Congress of the likely impact of the closure and (3) afforded Congress 60 days to reject the closure. *See* 10 U.S.C. § 2687(b) (Supp. IV 1980).

3. Intending to relinquish political responsibility for these sensitive base closure decisions, Congress and the President created an independent base closure commission under the 1988 Defense Base Closure and Realignment Act, Pub. L. No. 100-526. Congressional critics, however, charged that the 1988 commission's final closure decisions were made in secret, on the basis of flawed data, and that the GAO had no opportunity to review and verify the data.

4. On January 29, 1990, the Department of Defense unilaterally proposed to close the Shipyard and 35 other military installations in the United States. Because the Department's list of targeted bases "raised suspicions about the integrity of the base closure process," and to remedy the

lack of fair process inherent in the 1988 legislation, Congress enacted the 1990 Base Closure Act. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3110, 3257.

B. The Defense Base Closure And Realignment Act Of 1990

Petitioners *totally ignore* the indisputable fact that the express "purpose" of the Act is "to provide a *fair process* that will result in the timely closure and realignment of military installations." 10 U.S.C. § 2901(b) (emphasis supplied).[7] To ensure fairness, the Act creates an *independent* Base Closure Commission to prepare a package of base closures which must be accepted or rejected *in toto* by the President and the Congress.[8] The Commission is not a perfunctory agency. Its members are endowed with the only authority to determine particular bases for closure. § 2903(d)(2)(b).[9] However, in exchange for this autonomy in determining bases for closure, Congress mandated a number of non-discretionary procedural safeguards – agreed to by the President when he signed the Act into law – for the Commission's deliberations and conclusions that were absent from predecessor base closure statutes. As Petitioners *concede*:

- The Secretary of Defense ***must*** prepare and publish, subject to congressional disapproval, a six

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[7] *Not one word* of Petitioners' Brief reflects any recognition of the express purpose of the Act. Astonishingly, it is simply *ignored.*

[8] A provision of the Act not invoked in this case permits the President to send the list back to the Commission once. The Commission may or may not then revise the list, but, in any event, when resubmitted to the President, it must be accepted or rejected *in toto.* § 2903(e). If rejected, there will be *no* base closings for that year. § 2903.

[9] The Commission's members are appointed by the President only after consultation with Congress and confirmation by the Senate. § 2902(c).

year "force structure" plan assessing potential national security threats and the military force structure necessary to meet such threats. § 2903(a)(1)-(2), [Brief at 5];

- The Secretary ***must*** prepare and publish, subject to congressional disapproval, specific criteria for use in identifying military installations to be closed or realigned. Among the eight closure criteria promulgated by the Secretary is the "economic impact on communities" of a closure or realignment. 56 Fed. Reg. 6374 (Feb. 15, 1991), [Brief at 5];
- The Secretary's closure recommendations ***must*** be based upon the published force structure plan, the published base closure criteria and the relevant "data base." § 2903(c), [Brief at 5];
- The Secretary ***must*** transmit to both the Commission and the Comptroller General "all information used by the Department in making its recommendations to the Commission for closures and realignments," so that the GAO can assist the Commission in its deliberations. § 2903(c)(4), [Brief at 39 & n.26];
- The Commission ***must*** conduct public hearings on the Secretary's recommendations and must open all its deliberations to the public, except where classified information is discussed. § 2902(e)(2)(A), [Brief at 5-6].

The President has a mere 15 days to accept or reject the list submitted by the Commission in its entirety. If approved, the unchangeable list next goes to Congress, which is given a maximum of only 45 days to disapprove the package as a whole and but 2 hours to debate the matter. § 2908(d)(2).

It is unthinkable that Congress – having gone to such great lengths to create an act for the very "purpose" of

ensuring a "fair process" – intended to strip the federal judiciary of its historic role to check the bureaucracy's homework. The facts of the case now before this Court – where a fraudulent process will survive unchecked if Petitioners have their way – powerfully illustrate that such a construction of the Act would render it a complete nullity.

C. The Proceedings Below

1. On April 15, 1991, Secretary of Defense Richard Cheney submitted an extensive list of military installations to be closed or realigned to the 1991 Base Closure Commission. The Shipyard was one of the installations targeted for closure. The decision to close the Shipyard was the product of an admittedly *flawed and unfair* process. Contrary to the Act's express mandates, the Secretary, *inter alia*, concealed key Navy documents recommending that the Shipyard remain open, prevented the most knowledgeable commanding Naval officer from testifying before the Commission and failed to provide the GAO and the Commission with adequate documentation to support his recommendation for closure. In fact, the decision to close the Shipyard had been predetermined without any procedural safeguards and recorded on a "stealth list" formulated in secret before the 1990 Act was even passed.[10] *See* note 2, *supra*.

The GAO concluded that, because of lack of documentation, *it could not perform its statutory duty* to review the Navy's decision.[11] In an illegal attempt to "try to resolve missing gaps in the information provided," the Commission held closed meetings with the Navy after the public hearings

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[10] The Act expressly forbids the Secretary of Defense from considering any military installation on the basis of prior Department of Defense base closure considerations or recommendations. § 2903(c)(3).

[11] Indeed, the GAO Report concluded that the Navy's recommendations and process were *entirely* inadequate in violation of numerous provisions of the Act. [Amended Complaint, ¶¶139, 142-146, 151-152, at App. 36-39].

were completed during which it received documentation necessary to rationalize its predetermined conclusions. [Amended Complaint, ¶¶159-164, at App. 40-41]. On June 23, 1991, upon completion of its badly flawed process, the Commission submitted to the President an "indivisible package" of base closures that included the Shipyard.

3. Respondents filed their Complaint on July 9, 1991, and an Amended Complaint on July 19, 1991, seeking to enjoin the Secretary from closing the Shipyard because a fundamentally flawed process had tainted the results. Respondents alleged – and those allegations must be deemed true for purposes of this appeal, *see* note 5 *supra* – that the Secretary and the Commission had deliberately failed to comply with non-discretionary procedural mandates of the Act. On July 15, 1991, the President nevertheless approved the Commission's entire package of closures, and on July 30, 1991 (less than 15 days later), the House of Representatives, after only 2 hours of debate, rejected a resolution disapproving the Commission's recommendations. On August 30, 1991, the Secretary began closing targeted military installations.

4. On November 1, 1991, following expedited discovery and a hearing on Respondents' motion for preliminary injunctive relief, the District Court erroneously dismissed the Amended Complaint on the ground that the legislative history of the Act reflected a congressional intent to abrogate all judicial review. *Specter v. Garrett*, 777 F. Supp. 1226, 1227-28 (E.D. Pa. 1991).[12]

5. On April 17, 1992, the Court of Appeals reversed, holding that there was "no clear evidence of congressional intent to preclude all judicial review." *Specter v. Garrett*, 971 F.2d 936, 949 (3d Cir. 1992). The court concluded that the judicial branch has the power and duty to review violations of

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[12] Alternatively, the District Court found Respondents' claims nonjusticiable under the "political question" doctrine. *Specter v. Garrett*, 777 F. Supp. at 1227-28. That ruling, however, was reversed by the Third Circuit and as Petitioners' "Statement of Questions Presented" makes clear, is not an issue before this Court. [Brief at I].

the Act's mandatory non-discretionary procedures. 971 F.2d at 936.

6. On November 9, 1992, this Court granted *certiorari* and remanded the case to the Third Circuit for consideration of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). On remand, the Third Circuit found no reason to change its prior holdings.[13]

7. On August 28, 1993, Petitioners again sought *certiorari*, which was granted on October 18, 1993. For the following reasons, it is respectfully submitted that the decisions of the Court of Appeals for the Third Circuit should be affirmed.

SUMMARY OF THE ARGUMENT

Confronting "suspicions about the integrity of the base closure selection process," H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), Congress adopted the 1990 Base Closure Act as the "exclusive means for the closure of domestic bases." *Specter v. Garrett*, 971 F.2d at 947 (quoting § 2909(a)). The Act's express "purpose" is to ensure a fair process in the closure of domestic military bases. Petitioners argue that even a fundamentally flawed process is immune from judicial review. This strained interpretation ignores two centuries of precedent holding that, to protect our democracy, congressional limitations on delegated authority will be enforced by an independent federal judiciary. Nothing in

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[13] Petitioners suggest that the Third Circuit, on remand, based its conclusion of judicial review on constitutional grounds not raised by the parties. However, Respondents did argue the principle that drives the constitutional issue here: the executive branch is not above the law. Even if Petitioners were correct, however, it is a fundamental principle that an appellate court may affirm a decision on any ground supported by the record, even on a ground rejected by a lower court. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (prevailing party may "assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered" below) (citing *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

Franklin abrogates this historic role of the federal judiciary. Petitioners seek to obscure the core issues in this case by presenting hypertechnical, abstruse arguments which, if accepted, would eviscerate the meaning and purpose of the Act and create a most dangerous precedent.

I.A. The Third Circuit's opinions are consistent with *Franklin*. The Third Circuit concluded, as did *Franklin*, that the President's conduct is subject to judicial review to assure that neither he nor any of his subordinates have exceeded powers under applicable statutes or the Constitution.

B. *Franklin* does not alter the federal judiciary's historic role of ensuring that presidential conduct does not exceed statutory or constitutional authority. In fact, *Franklin* (the latest in a line of decisions stretching back nearly 200 years) confirms that presidential action may be reviewed even if review is not permitted under the Administrative Procedure Act ("APA"). Consistent with *Franklin*, the Third Circuit's initial opinion held that presidential conduct is subject to judicial review, independently of the APA, where it exceeds the scope of statutory or constitutional authority. On remand, the Third Circuit confirmed, holding that the President's approval of a procedurally flawed closure package exceeded his authority and thus raised a judicially reviewable separation of powers issue. Although Petitioners argue that the Third Circuit erred in relying on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court in *Franklin* itself cited *Youngstown* for the proposition that non-APA review of presidential acts is permissible where the President has exceeded his authority.

C. The unique facts which led this Court in *Franklin* to hold that the agency action was not final do *not* apply to the independent Base Closure Commission's report to the President, which must be accepted or rejected *in its entirety* within 15 days of receipt. In contrast to *Franklin*, where the President had complete discretion to reject or ignore the recommendations of the Secretary of Commerce and substitute his own data, the President *cannot* unilaterally amend or modify the base closure package, *nor* is he authorized to add or eliminate individual bases to the closure list. Indeed, the

President has neither the time nor the means to verify that the base closure package has been lawfully prepared pursuant to the "fair process" mandated by Congress.

Instead, the President must rely on the Commission's process in preparing the list. As the Third Circuit emphasized:

> Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a *specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.

971 F.2d at 947 (emphasis added). The Commission's actions are thus "final" for purposes of judicial review.

II. The Third Circuit correctly held that there was *not sufficient evidence to rebut the strong presumption that Congress intended judicial review of violations of the Act's procedural mandates.* While conceding that there is a strong presumption in favor of judicial review and that the Act does not expressly prohibit such review, Petitioners nonetheless suggest that the Act's structure, purpose and legislative history reflect "clear and convincing" evidence of a congressional intent to deny all judicial review, even review of constitutional and statutory violations. However, Petitioners' construction would render the Act a nullity since its mandate of a "fair process" could be flouted, as it deliberately was here, by the executive branch and its bureaucracy at will. If Congress had intended that result, it simply could have permitted the executive branch to close bases for any reason at all.

A. Petitioners argue that the base closure process under the Act is immune from judicial review because it implicates matters of "national security" or "sensitive questions of military policy." However, base closures that deal with matters of national security are *expressly exempt* from the Act. 10 U.S.C. § 2909(c)(2).

B. Petitioners' Brief totally *ignores* the Act's express "purpose," *i.e.*, to ensure a "fair process," and inexplicably

fails to contain even a *single reference* to this essential consideration. Their analysis, by definition, is thus as fatally flawed as the process it seeks to defend.[14]

C. Petitioners point to one ambiguous excerpt in the Act's Conference Report to support their position on judicial review. Their strained contention fails in light of the structure of the Act, its purpose and its legislative history, all of which unmistakably cry out for the federal courts to exercise their historic powers of review.

D. The text of the Act itself confirms the *availability* of judicial review. The Act's express limitation of review under the National Environmental Policy Act ("NEPA") demonstrates that Congress knew how to limit judicial involvement when it so intended. That it chose to do so only with respect to NEPA, *not* with respect to review of procedural violations of the Act, is compelling evidence that Congress intended judicial review.

III. If the Act were read to eliminate all judicial review, two constitutional problems would arise. First, Congress cannot delegate authority to close military bases to an independent, non-elected Commission unless judicial review is available to determine whether the Commission has acted within the scope of its authority. Without judicial review, the Act would represent an unconstitutional delegation of legislative authority. Second, abrogation of judicial review of claims arising under the Constitution is itself constitutionally suspect and intrudes upon the federal judiciary's role to protect the separation of powers. To avoid needlessly addressing these constitutional issues, this Court should construe the Act to provide for judicial review of Respondents' claims.

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[14] Petitioners erroneously suggest that a flawed process can be overcome through "substantial" presidential and congressional oversight. As discussed *infra* at pp. 29-32, 43-44, the President has a mere 15 days to accept or reject the Commission's indivisible list of closures and Congress has only 45 days (with a total of 2 hours of debate) to pass a joint resolution rejecting the list. §§ 2903(e), 2904(b), 2908(c)-(d).

ARGUMENT

I. *FRANKLIN v. MASSACHUSETTS* SUPPORTS JUDICIAL REVIEW.

A. The Third Circuit's Opinions Are Consistent With *Franklin*.

Under the "automatic reapportionment statute" at issue in *Franklin*, the Secretary of Commerce was required to report census data to the President, who then applied a formula specified in the statute to determine the number of representatives allocated to each state. 112 S.Ct. at 2771. No particular procedural safeguards were mandated for the Secretary to follow. The President subsequently transmitted the results to Congress for implementation of the decennial reapportionment. The Secretary included in her census report federal employees living abroad (primarily military personnel) as residents of their "designated" home state. Plaintiffs sought review of this report under both the APA and the constitution.[15] *Id.* at 2773.

The district court found for plaintiffs on their APA challenge and ordered the President to recalculate congressional apportionment using census figures that did not include overseas federal employees. *Id.* Reversing the district court in a direct appeal, this Court held that the Secretary's report to the President constituted mere "tentative recommendations" and was not "final" agency action subject to judicial review because the automatic reapportionment statute did not require

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[15] The Secretary's decision to include the disputed federal employees in the 1990 census caused one House seat to be shifted from Massachusetts to the State of Washington 112 S.Ct. at 2770. Plaintiffs argued that the Secretary's action was arbitrary and capricious because there was substantial evidence that when military personnel designated their home state upon induction, they disproportionately selected a state with low income tax rates rather than their actual home state. *Id.* at 2771-73. Plaintiffs' constitutional challenge was based on their argument that the inclusion of federal employees living abroad violated the requirement that the census be conducted through an "actual enumeration" of persons living within a state. *Id.* at 2773.

the President to accept or even consider the Secretary's census figures. He could act totally independently from the Secretary or instruct the Secretary to reform the census. *Id.* at 2774.

Franklin further held that the President's actions were not reviewable under the APA because the President is not an "agency" within the meaning of that statute.[16] *Id.* at 2775. This Court expressly confirmed, however, that regardless of his status under the APA, "the President's actions may still be reviewed for constitutionality." *Id.* at 2776.

Although the Third Circuit's initial opinion in this case was rendered before *Franklin*, it is consistent. The Third Circuit concluded that judicial review under the Act is appropriate after the Base Closure Commission's list has been transmitted by the President to Congress and not rejected within 45 days. In addition, the Third Circuit, anticipating *Franklin*'s ruling that the President is not an "agency" under the APA, assumed for the purpose of its analysis that presidential conduct is *not* subject to judicial review under the APA's "arbitrary and capricious" standard.

The Third Circuit nonetheless concluded, as did *Franklin*, that the President's conduct is subject to judicial review to assure that neither he nor any of his subordinates exceeded their powers under applicable statutes or the Constitution. The Third Circuit's opinion on remand, citing *Youngstown* – a case also relied on by *Franklin* – confirmed this basic precept of American jurisprudence. *See Specter v. Garrett*, 995 F.2d at 409. Thus, both *Franklin* and the Third Circuit's opinions

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[16] The Court explained: "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the APA's textual silence did not provide an adequate basis to assume that Congress intended that the President's performance of "statutory duties be reviewed for abuse of discretion." 112 S. Ct. at 2775.

hold that where the President exceeds the scope of his statutory or constitutional powers, judicial review *must* be available to preserve the tripartite structure of our constitutional form of government.[17]

B. *Franklin* Confirms The Historic Power Of The Federal Judiciary To Restrain Executive Branch Conduct Violating The Constitutionally Mandated Separation Of Powers.

Nothing in *Franklin* even purports to disturb the federal judiciary's historic role of ensuring that presidential conduct does not exceed constitutional or statutory boundaries. On the contrary, *Franklin's* narrow holding that the President is not an agency under the APA has *no* effect on the fundamental principles governing judicial review that originated nearly 150 years before the APA's enactment. *See, e.g., Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (President's instructions that went beyond scope of congressional authorization could not "legalize an act which without those instructions would have been a plain trespass"). *See also Interstate Commerce Comm. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"); *A & M Brand Realty Corp. v. Woods*, 93 F. Supp. 715, 717 (D.D.C. 1950) ("The purpose of [the APA] was to extend judicial review that had previously existed and to proscribe procedure and scope of judicial review. Such judicial review as existed outside of the Act remained unfettered by it.").[18]

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[17] Petitioners cite no authority for their argument that there is a meaningful distinction between presidential actions taken in excess of statutory authority and actions taken contrary to a constitutional provision. No case has ever suggested that the federal judiciary does not possess the constitutional power to review under the separation of powers doctrine the actions of the President for statutory or constitutional compliance.

[18] Petitioners rely on *Cohen v. Rice*, 992 F.2d 376 (1st Cir. 1993), as support for the total abrogation of judicial review under the Act.

Rather than limiting *Youngstown* (or any other source of judicial review of presidential conduct other than under the APA's "arbitrary and capricious" standard), *Franklin relied on Youngstown* for the proposition that the President's conduct is subject to review for constitutionality. The Third Circuit also properly relied on *Youngstown* to conclude that the President's conduct is subject to constitutional review where he exceeds the scope of authority granted by Congress under the Base Closure Act. *Franklin* is thus not only consistent with, but affirmatively supports, the decision below.

1. Executive Branch Conduct That Violates The Scope Of Authority Delegated By Congress Or The Constitution Will Be Enjoined To Preserve The Constitution's Separation Of Powers.

The Constitution divides governmental power into three branches: the legislative, the executive and the judicial. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). That division of powers and functions "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that was drafted in Philadelphia in the Summer of 1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). The Constitution separates the branches of government "not to promote efficiency, but to preclude the exercise

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Significantly, just three weeks ago, the Second Circuit in *County of Seneca*, ___ F.3d ___, 1993 WL 504463 (2d Cir., Dec. 10, 1993), agreed with the Third Circuit that violations of the Act's fair process mandate are judicially reviewable. *See* note 1, *supra*. To the extent *Cohen* even applies, it is plainly wrong. *Cohen* affirmed summary judgment for the government on the ground that the Commission's transmittal of the base closure package to the President was not final agency action within the meaning of *Franklin*. For the reasons stated herein, that ruling was erroneous. *See* discussion *infra* at pp. 29-32. Moreover, *Cohen* did not even purport to address the federal courts' historic powers (outside of the APA) to review presidential conduct which exceeds statutory or constitutional authority. Without a valid package, the President simply lacks the authority to act. *See* discussion *infra* at pp. 20-27.

of arbitrary power" and to "save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). To protect that vital safeguard of liberty, the *Youngstown* Court enjoined enforcement of a presidential order that exceeded both the scope of authority granted by Congress and that granted under Article II of the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). *See also* Hamilton, *The Federalist No.* 78 ("There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.").

Franklin's reliance on *Youngstown* was well placed. In April, 1952, at the height of the Korean conflict, the steelworkers' unions gave notice of a nationwide strike. To ensure continued production of essential war materials, President Truman ordered the Secretary of Commerce to seize and operate the steel mills. Justice Black's "Opinion of the Court" first recognized that the President's authority was limited by the Constitution's separation of powers:

> The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

343 U.S. at 587.

Finding the President without either constitutional or statutory authority to order the seizure of private industries – regardless of the asserted military crisis – the Court declared the President's order illegal and affirmed the injunction against the Secretary entered below. *See* Currie, *The Constitution in the Supreme Court: 1888-1986*, p. 369 (Chicago 1990) ("*Youngstown* . . . stands as an eloquent reminder that the President must obey the law and that in general he may act only on the basis of statute.").

The pole-star of *Youngstown* – that the executive branch is bound by express limitations on authority granted by Congress and the Constitution – is almost as old as the Republic itself. In *Little v. Barreme*, an action for damages was brought against the commander of an American warship for his capture of a Dutch commercial vessel on the open seas. The commander defended his seizure on the grounds that: 1) the President had instructed naval commanders to seize American vessels bound to or from French ports; and 2) there was probable cause to believe the ship of American origin. In fact, the *Flying Fish* was of Dutch, not American origin. More critically, however, the statute under which the President issued the instructions only authorized the seizure of American vessels sailing *to* French ports, and the *Flying Fish* had been seized on its way *from* a French port.

While noting that it was "by no means clear" that the President lacked constitutional authority to order the seizure as Commander-in-Chief, Justice Marshall nonetheless emphasized that Congress *had* prescribed limited grounds for seizure. 2 Cranch at 177-78. Justice Marshall thus concluded that, as the President's instructions had gone beyond the scope of the limited congressional authorization, they could not "legalize an act which without those instructions would have been a plain trespass." *Id.* at 178. *See also Kendall v. United States*, 37 U.S. (12 Pet.) 524, 610 (1838) ("[I]t would be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.").

Youngstown and *Little* stand for a principle at the very core of our constitutional government – that where the President or subordinate executive officers act beyond the scope of their legal authority, judicial relief must be available to protect the separation of powers. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) ("When judicial action is needed to serve broad public interests . . . as when the Court acts, not in derogation of separation of powers, but to maintain their

proper balance . . . that exercise of jurisdiction has been held warranted"); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) ("This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution. . . . "); *Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress"). Nothing in *Franklin* abrogates that critical role of the federal judiciary. And nothing in the Third Circuit's opinions below is inconsistent with *Franklin*.[19]

2. Judicial Review Is Available To Secure Executive Branch Compliance With The Mandatory Procedural Requirements Of The 1990 Base Closure Act.

Petitioners concede that their *only* authority to close domestic military bases is that which they obtained from Congress under the Base Closure Act: "Neither the President nor petitioners have relied on inherent Article II powers in selecting the Philadelphia Naval Shipyard for closure." [Brief at 33]. It is likewise undisputed for the purposes of this appeal that they deliberately ignored congressionally mandated procedural safeguards in determining to close the Shipyard. Thus, Petitioners, having acted without either statutory

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[19] Even Justice Scalia's separate opinion in *Franklin*, although suggesting that separation of powers concerns should prevent a federal court from entering injunctive relief against the President, nonetheless distinguished between an injunction against the President directly and one against a subordinate executive officer attempting to carry out an illegal presidential directive. Justice Scalia's reluctance to allow the former did not:

> in any way suggest that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.

112 S. Ct. at 2790 (emphasis in original) (citing *Youngstown*). In the present case, Respondents seek to enjoin the Secretary of Defense, not the President, from closing the Shipyard.

or constitutional authority, cannot close the Shipyard. *Youngstown* and *Franklin* both support the Third Circuit's holding that judicial review is available to enjoin Petitioners from exceeding the scope of their legal authority.

(a) The President Was Without Statutory Authority To Approve A Base Closure Package Prepared In Violation Of The Congressional Mandate.

Petitioners first suggest that *Youngstown* can be distinguished because it involved an assertion of presidential authority that Congress had specifically rejected when it refused to amend the Taft-Hartley Act to permit executive branch seizure of private industry. In contrast, Petitioners argue, the Base Closure Act authorizes the President to accept or reject the Commission's indivisible base closure package for any reason at all. Thus, according to Petitioners, the President's limited involvement under the Act places the entire base closure process beyond judicial review, even though the Secretary and the Commission deliberately violated congressional mandates in performing their respective statutory duties.[20]

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[20] In fact, *Franklin* itself suggests that no amount of statutory discretion can ever insulate a President from the illegal conduct of subordinate executive officers. In holding the President's conduct subject to constitutional review regardless of APA status, and despite the lack of finality of the Secretary's tentative census report, the *Franklin* Court nonetheless examined whether "the Secretary's allocation of overseas federal employees to the States violated the command of Article I, § 2, cl. 3, that the number of Representatives per State be determined by an 'actual Enumeration' of 'their respective Numbers.' " 112 S. Ct. at 2777 (emphasis added). Nothing in *Franklin* suggested that federal overseas employees were included in the 1990 census at the President's direction or that the President was required by statute to approve the Secretary's methods. Yet nothing in *Franklin* suggested that the majority had changed its mind and decided to review the Secretary's conduct, regardless of finality. Thus, *Franklin* reviewed only the ***President's*** conduct in deciding whether the ***Secretary's*** census method violated the Constitution.

Petitioners radically misconstrue both the nature of the statutory scheme at issue here and the nature of the President's limited involvement within that scheme. As the Third Circuit recognized, the President's *only* authority under the Act is to approve or reject a base closure package which was prepared in accordance with the statutory procedures:

> [W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base. Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure* that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.
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> * * *
>
> *[H]ere, the [President's] only available authority has been expressly confined by Congress to action based on a particular type of process.*

995 F.2d at 407, 409 (footnote omitted) (emphasis partly in original).

The President has no greater statutory authority to approve a materially flawed base closure package than he has to submit to Congress a closure package of his own independent creation. Where the Act's non-discretionary statutory safeguards have been ignored, the President receives nothing from the Commission upon which he has statutory authority to act. Hence, the President's "approval" of the 1991 base closure package was "without authority of law, illegal and void." *Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 418 (Customs Ct. App. 1935) (where Tariff Commission failed to

provide public notice required by statute, presidential proclamation based on Commission's defective recommendation "was without authority of law, illegal and void").

As with the Base Closure Act, the statutory scheme in *American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349 (D.C. Cir. 1965), required presidential approval of agency determinations. Specifically, the statute authorized the President to approve or reject decisions of the Civil Aeronautics Board (the "Board") affecting overseas air carriers. Seventeen years earlier, in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), this Court had declared that, in light of the President's broad constitutional authority over foreign affairs, his statutory approval of a Board determination was not subject to judicial review on the ground that the Board order lacked "substantial evidence." *Id.* at 111-12.[21]

Chief Justice (then Judge) Burger distinguished *Waterman* as involving only whether the Board determination was supported by "substantial evidence." 348 F.2d at 353. In contrast, plaintiffs in *American Airlines* alleged that the Board acted beyond the scope of statutory authority in authorizing "split charter" arrangements. *Id.* at 351. In finding that *Waterman* did not preclude review of the President's approval

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[21] Although the *Waterman* majority did not specify the nature of the plaintiffs' challenge to the Board order at issue, the dissent noted that plaintiffs had alleged the Board lacked "substantial evidence" to support its findings. 333 U.S. at 117. In any event, the majority did note that the Board proceedings were not being "challenged as to regularity." *Id.* at 105. Based on that language, subsequent courts have distinguished *Waterman* as *not* involving a claim that the Board exceeded the scope of its statutory authority. *See Alaska Airlines, Inc. v. Pan American World Airways, Inc.*, 321 F.2d 394, 396 (D.C. Cir. 1963) ("[*Waterman*] neither settles nor illuminates more than faintly the issues which would face a court reviewing the authority of the Board"); *American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349, 353 (D.C. Cir. 1965) (Burger, J.) (*Waterman* has no relevance where "the President purports to approve a recommendation which the Board was powerless to make").

of a Board determination itself violating statutory authority, Judge Burger held:

> The deference *Waterman* accords to presidential discretion in matters of national defense and foreign policy as they bear on overseas air carriers has no relevancy where, as here alleged, the President purports to approve a recommendation which the Board was powerless to make; *if indeed the Board has no power, then as a legal reality there was nothing before the President.*

Id. at 353 (emphasis added). *See also* Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 708 (1961) ("if the President cannot act without a Board recommendation, it hardly seems likely that he can act upon one that fails to comply with the statutory requirements. And the function of determining whether the statutory requirements have been fulfilled is that of the court and not of the executive, for the answer to this question will also decide whether the executive himself was acting within his statutory authority").

From the outset, Respondents have alleged that the Secretary and the Commission acted beyond the scope of congressional authority in preparing the 1991 base closure package. And as the Third Circuit acknowledged, the President's own statutory authority is "expressly confined by Congress to action based on a particular type of process." Because that process was materially flawed, the President had no lawful base closure package upon which he could act. The President's purported approval of the defective package, and his transmission of that defective package to Congress, were thus beyond the scope of the statutory authority delegated to him by Congress. Both *Youngstown* and *Franklin* establish that, to protect the constitutionally mandated separation of powers, the President's involvement in the base closure process must be subject to judicial review.

(b) Where The Executive Branch Exceeds The Scope Of Authority Delegated By Congress, It Necessarily Breaches The Constitutionally Mandated Separation Of Powers.

While Petitioners concede that *Franklin* permitted constitutional review of the President's conduct, they contend that *Franklin's* holding is not relevant here because the President violated only a statute, not the Constitution. In contrast, Petitioners suggest, *Franklin* reviewed whether the Secretary's census method violated a specific provision of the Constitution. *Without citing any authority*, Petitioners assert that the distinction between presidential conduct that violates the constitutionally mandated separation of powers, and presidential conduct that violates specific constitutional provisions, makes a difference with respect to the availability of judicial review under the Base Closure Act. That argument must be flatly rejected.

In holding the President's conduct subject to constitutional review, *Franklin* relied squarely on *Youngstown*. Yet *Youngstown* itself relied on the separation of powers precepts that are not traceable to any specific constitutional provision, but instead are "woven into the document" as a whole. *See Buckley*, 424 U.S. at 123. *Youngstown* examined not just whether the executive branch violated a single constitutional provision, but whether the President's conduct had breached the very fabric of our constitutional order. The President's violation of the Base Closure Act raises constitutional concerns no less compelling.

Thus, the Third Circuit properly relied on both *Franklin* and *Youngstown* in holding that judicial review is available to determine whether the President exceeded the scope of his statutory authority in approving the 1991 base closure package. As recognized below:

> We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take

> and that judicial review is available to determine whether such authority exists. *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. Indeed, we note that the *Youngstown* Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*.

995 F.2d at 409 (citations and footnote omitted).

Whether judicial review in this case is labeled "constitutional review," or a "form" of constitutional review, is not important. Regardless of label, judicial review of the President's compliance with the law is an absolute necessity if the separation of powers is to serve the purpose for which it was designed. *See American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("The acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (executive branch officer cannot claim immunity from judicial process where he is "acting in excess of his authority or under an authority not validly conferred").

(c) For The Purpose Of Determining The Scope Of Judicial Review, No Distinction Can Be Made Between Constitutional Claims Involving Separation Of Powers Issues And Claims Involving Constitutionally Protected Property Interests.

Finally, Petitioners attempt to distinguish *Youngstown* as involving constitutionally protected private property rights. In contrast, Petitioners suggest, the "constitutional" issue raised here involves the separation of powers. Petitioners fail to explain, however, why that distinction should make any difference, particularly since the decision below sustaining Respondents' standing is not on appeal here. Clearly, Petitioners elevate form over substance.

In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), a constitutional challenge to the "legislative veto," this Court rejected a similar attempt to elevate "private" constitutional rights over constitutional claims involving separation of powers issues:

> We must . . . reject the contention that Chadha lacks standing because a consequence of his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress, rather than simply Chadha's private interests. . . . If the [legislative] veto provision violates the Constitution, and is severable, the deportation order against Chadha will be canceled.

Id. at 935-36 (citation omitted). *See also Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("the Constitution diffuses power the better to secure liberty"); Madison, *The Federalist No.* 51 ("the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a sentinel over the public rights").

Here, as in *Chadha*, if Respondents prevail on their argument that judicial review is necessary under the Act to implement the intent of Congress, and if they are able to enjoin the Shipyard's closure, their private interests will certainly be advanced. *Franklin's* constitutional challenge to the

Secretary's census allocation of overseas federal employees involved no more of a "private" constitutional right than the separation of powers challenge raised by Respondents here. To conclude that Congress intended to give the executive branch unlimited power to close military bases for whatever reason it deemed proper (or for no reason at all) would render the Act meaningless. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (" 'The cardinal principle of statutory construction is to save and not to destroy'. . . . It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires"); *Shapiro v. United States*, 335 U.S. 1, 31 (1948) ("we must heed the . . . well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

3. *Franklin* Must Not Be Read To Eviscerate The Congressional Mandate Of Fair Process In The Closure Of Domestic Military Bases, Thereby Nullifying The Act.

Limited presidential involvement in a statutory scheme cannot give the imprimatur of legality to executive branch conduct brazenly violating congressional mandates. When Congress declared a statutory "purpose" – *i.e.*, to ensure a *"fair process"* – it certainly never intended for the executive branch to decide for itself whether the law should be obeyed. *See Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers."). The power of this argument is dramatically confirmed by Petitioners' astonishing failure to deal with it. Not even once in any of the 48 pages of their Brief do Petitioners acknowledge the declared "purpose" of the Act. They disingenuously ignore it – just as they boldly ignored the Congressional mandates designed to ensure the "fair process."

The fallacies in Petitioners' interpretation that there is no judicial review are illustrated by the following hypothetical. Assume that: (1) totally ignoring his statutory duty (§ 2903(b)), the Secretary of Defense proposes base closures supported not by a force-structure plan or by any public comment, but rather based upon his personal prejudice, bias and animus, and he refuses to transmit any information to the Comptroller General; (2) despite knowledge of these violations and in violation of its own statutory duties (§ 2903(d)), the Commission approves the Secretary's recommendations without public hearings and based upon a totally deficient administrative record; (3) the President, knowing but not caring that the Act has been ignored and refusing to overrule his Secretary of Defense, summarily approves the closure list in the scant 15 days provided; (4) Congress, preoccupied with pressing military, health care and budgetary matters, cannot possibly consider a joint resolution of disapproval within 45 days, and after only 2 hours of debate; and (5) the proposed bases are closed, disrupting the lives of tens of thousands of people and the communities in which they live – all *without* a fair process.

Petitioners' strained interpretation would preclude judicial review of even the most blatant, arbitrary and unlawful executive branch disregard of the procedures mandated by Congress to ensure a "fair process." That remarkably extreme argument cannot be squared with *Youngstown's* fundamental principle that the "Constitution is neither silent nor equivocal about who shall make the laws." As Justice Frankfurter cautioned in *Youngstown*:

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

343 U.S. at 594 (Frankfurter, J., concurring).

C. Because The President Has No Authority To Accept A Base Closure Package Which Was The Product Of An Unfair Process, The Commission Report Is "Final" For The Purpose Of Judicial Review.

The Base Closure Act and the automatic reapportionment statute in *Franklin* do not share "similar statutory schemes." In *Franklin*, the act imposed no procedural requirements on the Secretary of Commerce and the Secretary's report to the President carried "no direct consequences" and had "no direct effect." 112 S. Ct. at 2774. Indeed, the President could amend the Secretary's recommendations or instruct the Secretary to reform the census in such a manner as to completely change the outcome of reapportionment. *Id.* (statute did not "require the President to use the data in the Secretary's report"). In fact, a Department of Commerce press release, issued the same day that the Secretary presented her report to the President, expressly confirmed that "the data presented to the President was still subject to correction." *Id.*

In stark contrast to the statute in *Franklin*, the Base Closure Act does not permit the President to ignore, revise or amend the Commission's list of closures. He is only permitted to accept or reject the Commission's closure package in its entirety and is not permitted to "cherry-pick" – *i.e.*, to add or eliminate individual bases.[22] As Petitioners concede:

> A critical feature of the process is the use of an *independent* and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To *safeguard* the Commission's role in the process, the Act provides that its recommendations *must* be considered as an *indivisible package*. H.R. Conf. Rep. No. 923, supra, at

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[22] The Act does not permit either the President or Congress to target any individual base or group of bases for closure. The list must be accepted or rejected by the President and Congress as presented. Thus, neither the President nor Congress could close a base not included on the Commission's indivisible base closure list.

> 704. The President may trigger base closures under the Act only by approving 'all the recommendations' of the *independent* Commission.

[Brief at 40 (emphasis added)]. The Act does not give the President either the time[23] or the resources to determine whether Petitioners complied with the Act's procedural mandates; indeed, that historically has been the function of the judiciary. *See Stark v. Wickard*, 321 U.S. 288, 310 (1944) ("[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and [defining] their jurisdiction").

The President must rely exclusively on the final report of the agencies in making his decision, and the legitimacy of that decision hinges entirely on the agencies' adherence to the mandated procedural safeguards that are the *raison d'etre* of the Act. *See, e.g., Carl Zeiss, Inc. v. United States*, 76 F.2d 412, 418 (Customs Ct. App. 1935) (where Tariff Commission failed to provide public notice required by statute, presidential proclamation based on Commission's defective recommendation "was without authority of law, illegal and void"); Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 700 (1961) (supporting "decisions holding that the courts will determine whether the Commission has complied with the statutory requirements regarding notice and hearing and, finding such defects, will hold invalid a presidential proclamation based on such an investigation"). For the base closure process to function as Congress intended and for the President's decision to be informed and responsible, the Act's procedural mandates must be complied with at the *agency* level. The agencies' actions must therefore be "final" for the purpose of judicial review. *See Franklin*, 112 S. Ct. at 2773 ("core

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[23] *See* 10 U.S.C. § 2903(e) (President has only 15 days to review Commission's report).

question" regarding finality is whether "the agency has completed its decisionmaking process" and whether "the result of that process is one that will directly affect the parties").

Petitioners thus err in stating that the Act "makes the President *personally* responsible for base closure decisions, and provides for extensive congressional involvement and *oversight* in the process." [Brief at 15]. Petitioners themselves concede elsewhere in their Brief that Congress and the President intended to *avoid* responsibility for politically sensitive closure decisions by delegating their authority to target bases for closure to an independent commission. [Brief at 2-3]. The Secretary and the Commission alone are subject to the Act's procedural requirements and where those mandates have been ignored, the President is left without a legal package of base closures upon which to act. *See American Airlines, Inc. v. Civil Aeronautics Bd.*, 348 F.2d 349, 353 (D.C. Cir. 1965) (if agency action was without statutory authority, "then as a legal reality there was nothing before the President"). *See also* Hochman, *Judicial Review of Administrative Processes in which the President Participates*, 74 Harv. L. Rev. 684, 708 (1961) (where the President cannot act without agency recommendation, "it hardly seems likely that he can act upon one that fails to comply with the statutory requirements. And the function of determining whether the statutory requirements have been fulfilled is that of the court and not of the executive, for the answer to this question will also decide whether the executive was himself acting within his statutory authority.").

Denial of judicial review in this case would not only thwart the will of Congress as expressed in the Act and its legislative history, but would effectively issue blank checks to the bureaucracy in a wide range of future cases to disclaim any accountability to Congress, the courts and the public. Such an unsalutary result could not have been intended by this Court in *Franklin*. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J. concurring) ("It may be presumed that Congress does not intend administrative agencies,

agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory or constitutional commands . . . "); *Leedom v. Kyne*, 358 U.S. 184, 190 (1958). Indeed, to apply *Franklin* in the sweeping manner urged by Petitioners would eviscerate the two centuries of pre-*Franklin* precedent sustaining judicial review of agency action.

II. THE STRONG PRESUMPTION OF JUDICIAL REVIEW UNDER THE ACT HAS NOT BEEN REBUTTED BY "CLEAR AND CONVINCING EVIDENCE."

It is axiomatic that judicial review of final agency action "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). It is "presume[d] that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen*, 476 U.S. at 681. This strong presumption in favor of judicial review can be overcome only upon a showing of "clear and convincing" evidence of a contrary congressional intent. *Id.* As emphasized in *Bowen:*

> We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' [citation omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 2 L Ed 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that '[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.'
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> * * *

Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the Administrative Procedure Act the Senate Committee on the Judiciary remarked:

'*Very rarely* do statutes withhold judicial review. It has *never* been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board.' [citation omitted].

* * *

The Committee on the Judiciary of the House of Representatives agreed that Congress ***ordinarily*** *intends that there be judicial review*, and emphasized the clarity with which a contrary intent must be expressed:

'The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.' [citation omitted].

476 U.S. at 670-71 (emphasis added). *See also* ***Stark v. Wickard***, 321 U.S. 288, 309 (1944) ("[I]t is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue"). *Accord*, Jaffe, ***The Right to Judicial Review I***, 71 Harv. L. Rev. 401, 403 (1958) ("there is in our society a profound, tradition-taught reliance on the courts as the ultimate guardian and assurance of the limits set upon

executive power by the constitutions and legislatures"); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946) ("statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases").

As Petitioners concede, the Act contains no express limitation on judicial review. That is itself evidence that Congress intended judicial review, since when Congress intends such a radical departure from tradition, it knows how to do so in plain language.[24] Indeed, as Petitioners themselves point out, in the *very statute at issue in this case*, Congress expressly limited procedurally-oriented challenges under NEPA, thereby conclusively demonstrating that it knew how to abrogate procedural challenges if it wanted to. *See* Brief at 43-44. Therefore, the complete absence of any language in the Base Closure Act expressly precluding judicial review must be deemed intentional, particularly in light of the express statutory purpose of ensuring a "fair process." *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 97-99 (1991).

In addition, as the Third Circuit held, neither the structure nor the legislative history of the Act contain evidence of congressional intent to abrogate judicial review. 971 F.2d at 949-50 ("we find no clear evidence of a congressional intent to preclude all judicial review other than limited NEPA review"). The presumption in favor of judicial review is of even greater force where, as here, it is alleged that the

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[24] *See, e.g.*, The Regulatory Flexibility Act of 1980, 5 U.S.C. § 611(a)-(b) (1982) (expressly precluding substantive and procedural judicial review of an agency's compliance with the Act); Export Regulations of the War and National Defense Act, 1979, Pub. L. No. 96-72, 50 U.S.C. § 2412 (expressly exempting certain actions taken under the Export Regulation subchapter of the War and National Defense Act from 5 U.S.C. §§ 551, 553-559 of the APA and from the APA's judicial review sections (5 U.S.C. §§ 701-706)). *See also* Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 791 (1958) ("The right to judicial review is too basic a protection. It is not too great a burden upon Congress to require it to speak to the issue.").

executive branch has exceeded the scope of delegated authority or has violated specific constitutional provisions. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence"); *Leedom v. Kyne*, 358 U.S. 184, 190-91 (1958). As set forth below, each of Petitioners' arguments to the contrary fail to rebut the strong presumption of judicial review.

A. National Security And Military Policy Concerns Do Not Abrogate Judicial Review.

Petitioners argue that the strong presumption in favor of judicial review is inapplicable to the closure of domestic military bases because such decisions involve "sensitive questions of national security and military policy." [Brief at 36-37]. They further contend that courts should not "intrude upon the authority of the executive in military and national affairs." However, the Act was expressly designed to provide a "fair process" for the closure of bases which severely impacted on regional economics and a significant number of *civilian*, not military, employees. 10 U.S.C. § 2687(a); § 2909(c).

Moreover, Congress considered issues of national security when it formulated the exclusive procedure under which domestic military bases are to be closed or realigned. The Act expressly *exempts* from its coverage the closure of a military base "if the President certifies to Congress that such closure . . . must be implemented for reasons of national security or military emergency." 10 U.S.C. § 2687(c). No such certification was made with respect to the Shipyard, which Petitioners concede has been slated for closure pursuant to the Act. Petitioners thus err in arguing that the "national security" concerns implicated by the closure of military installations should be construed to eliminate the strong presumption of

judicial review. *See also Vogelaar v. United States*, 665 F. Supp. 1295, 1303-04 (E.D. Mich. 1987).

Petitioners' reliance on *Department of Navy v. Egan*, 484 U.S. 518 (1988), is equally misplaced. *Egan* involved the Navy's refusal to grant a security clearance to a civilian employee working at a Trident nuclear submarine base. Concluding that the Navy's denial was not subject to review, the Court found that the "sensitive and inherently discretionary judgment call" that must be made on each request for a security clearance was "committed by law to the appropriate agency of the executive branch." In reaching that conclusion, the Court expressly noted that the President's broad discretion regarding access to information bearing on national security flowed from his constitutional powers as commander and chief and "exist[ed] quite apart from any explicit congressional grant." *Id.* at 527.

In contrast to *Egan*, Petitioners expressly disclaim any authority for their actions other than that granted to them by Congress under the Act. [Brief at 33]. Moreover, it is well established that the mere involvement of issues affecting the military does not immunize executive branch conduct from review. In fact, judicial review has been found particularly appropriate when, as here, "the actions of the military affect the domestic population during peacetime." *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

B. Judicial Review Is Consistent With The Timetables And Objectives Of The Act.

Petitioners suggest that "[b]y allowing litigants to contest individual base closures after the President has approved and Congress has declined to disapprove [an indivisible] package of base closures, the Third Circuit has struck at the heart of the carefully balanced statutory mechanism enacted by Congress." As support for that position, they refer to the Act's "rigid series of deadlines and time limits" without a single reference to the Act's "fair process" mandate. [Brief at 42]. That argument, however, contains the seed of its own destruction, for without judicial review the executive branch could

simply ignore the Act's procedural timetable, just as it here ignored the Act's procedural "fair process."

Could the Secretary attempt to initiate a base closure round in 1994 – a year not provided for in the statute? Could the President attempt to submit a base closure package to Congress thirty days (instead of 15 days) after he received it from the Commission, and then direct his Secretary of Defense to begin closing military bases after Congress was unable to muster the votes for a resolution of disapproval? Could Congress disapprove a closure package 90 days (instead of 45 days) after its receipt from the President? Would any base closure package tainted by such procedural defects properly be enjoined by a federal court?[25] Taking Petitioners' fundamental argument to its logical conclusion, the answer to all of the foregoing questions would be a clear "*No*."

Petitioners' argument flies in the face of the paramount fact that the declared *purpose* of the Act is to ensure the *procedural integrity* of the base closure process. Understanding "the importance of public confidence in the integrity of the decision making process," Congress mandated a number of critical procedural safeguards, not one of which had appeared in prior legislation. H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990) (Congress designed the procedural safeguards of the 1990 Act to allay continuing "suspicions about the integrity of the base closure selection process").

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[25] Petitioners' own Brief concedes that: (1) the Secretary: a) "*must* submit a six-year force structure plan", b) "*must* establish . . . selection criteria for base closure recommendations" and c) "*must* prepare base closure recommendations"; (2) the Commission: a) "is *charged* with" holding public hearings, b) preparing a single package of recommendations and c) "*must*" forward a single indivisible package of base closures to the President by July 1; (3) the President "*must*" approve or disapprove the entire package within 15 days; and (4) Congress *must* disapprove the entire package – if at all – within 45 days. [*See, e.g.*, Brief at 5-6, 16]. *See* § 2904(b) (Secretary may not carry out any closure or realignment if Congress enacts joint resolution disapproving Commission's base closure package within 45 days of receipt from President).

The express purpose of these safeguards was to ensure that the Commission, the President and Congress each received "balanced and informed advice" in the course of their statutory duties. Considering the genesis, purpose and nature of this procedurally-oriented statute, if quick closures were the only goal, the 1990 Act would have been totally unnecessary. Indeed, as recognized by the Third Circuit, there is:

> little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established. Judicial review at this stage will not interfere with the decision-making process and holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time consuming; bases are not closed or realigned overnight. The process of judicial review has proved sufficiently flexible to accommodate governmental action involving far greater exigency.

971 F.2d at 948 (citations omitted).

C. Limited And Ambiguous References In The Legislative History To The Scope Of APA Review Do Not Reflect Congressional Intent To Preclude Judicial Review.

Petitioners further suggest that the Act's legislative history reflects a congressional intent to preclude review. That argument, however, rests on a strained misreading of an ambiguous excerpt from the Act's Conference Report and does not constitute "clear and convincing" evidence of an intent to deny judicial review.[26] The Conference Report states:

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[26] To begin with, one never gets to the legislative history to destroy the expressed *purpose* of an unambiguous statute. *See Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992) (clarity of statutory language obviates

> The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) contain explicit exemptions for 'the conduct of military or foreign affairs functions.' An action falling within this exception, as the decision to close and realign bases surely does, is immune from the provisions of the Administrative Procedure Act dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the Administrative Procedure Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan under section 2903(a), the issuance of selection criteria under section 2803(b), the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), the decision of the President under section 2803(e), and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 706, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3258 ("H.R. Conf. Rep. 101-923").

Even if it were appropriate to review this legislative history, given the clear and unambiguous expression of Congressional intent in the Act's "fair process" mandate, the Conference Report reflects, at most, that in carrying out their

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need for inquiry into legislative history); *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("best evidence" of congressional intent "is the statutory text adopted by both Houses of Congress and submitted to the President").

statutory duties under the Act, the Secretary of Defense and the Commission were to be exempt from the rulemaking and adjudication provisions of *Chapter 5* of the APA (5 U.S.C. §§ 553, 554, 556 and 557). This limitation, however, is entirely separate and distinct from the review sought here under *Chapter 7* of the APA.[27] A broad right to judicial review of agency action is provided by Chapter 7 to determine, *inter alia*, whether Petitioners' actions were "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).[28]

Moreover, the quote from the Conference Report does not reflect congressional intent to preclude judicial review of the *integrity* of the process. The Report's list of "[s]pecific

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[27] Chapter 5 of the APA, which establishes procedures for agency rulemaking and adjudication (5 U.S.C. §§ 553 and 554), is entirely separate and distinct from Chapter 7 of the APA, which grants a broad right to judicial review of agency action by aggrieved persons (5 U.S.C. §§ 701 *et seq.*), and does not contain equivalent limitations. Petitioners disregard the fact that agency action may be exempt from the APA's special procedural requirements for agency rulemaking (§ 553) and agency adjudication (§§ 553 and 554) on any of several independent grounds, but nonetheless remain subject to the entire spectrum of judicial review under Chapter 7, *e.g.*, to determine whether agency action was "without observance of procedure required by law," or was "contrary to constitutional right, power, privilege or immunity." 5 U.S.C. § 706(2). *See, e.g., Common Cause v. Dept. of Energy*, 702 F.2d 245, 249 n.30 (D.C. Cir. 1983).

[28] One important illustration of the distinction between these two sets of provisions is that, as set forth in Petitioners' Brief, the rulemaking and adjudication provisions contained in Chapter 5 of the APA expressly do *not* apply to "the conduct of military or foreign affairs functions." 5 U.S.C. §§ 553 and 554. However, the right to judicial review found in Chapter 7 is *not* subject to this exception, but rather has its own exceptions, which apply only to Chapter 7 of the APA. Accordingly, a particular agency action may be exempt from the rulemaking and adjudication procedural requirements of the APA as being a military function, but nevertheless be subject to judicial review under section 702 of the APA for adherence to constitutional, statutory and procedural requirements. *See, e.g., International Assoc. of Machinists and Aerospace Workers v. Secretary of the Navy*, 915 F.2d 727 (D.C. Cir. 1990).

actions which would not be subject to judicial review" *omits the actions of the Commission* itself in preparing the base closure package. That omission is highly relevant since the Commission has the dominant role in the base closure process. Plainly, that omission was not an oversight, and demonstrates that the actions of the Commission itself were intended to be subject to judicial review for compliance with the Act's mandatory procedures. Thus, the legislative history on which Petitioners so heavily rely does *not* provide "clear and convincing evidence" necessary to abrogate the Act's unambiguously declared purpose to ensure a "fair process" and, at the very least, leaves "substantial doubt" that Congress intended to preclude all judicial review. Thus, the "general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

D. The Act's Limitation On Review Of NEPA Claims Is Not Evidence Of Congressional Intent To Abrogate Judicial Review Of The Claims In This Case.

Petitioners contend that the Act's express limitations on review under NEPA (the National Environmental Policy Act of 1969), reflect a congressional intent to preclude all other forms of judicial review.[29] [Brief at 43-44]. That argument was decisively rejected by the Third Circuit:

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[29] NEPA is a "disclosure" statute requiring federal agencies to include an Environmental Impact Statement "in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Congress recognized that NEPA litigation had been used "to delay and ultimately frustrate base closure." H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. (1988) at 23. The Act therefore only requires the Department of Defense to comply with NEPA's disclosure mandates "during the process of relocating functions from a military installation being closed or realigned to another military installation . . . " 10 U.S.C. § 2905(c)(2)(A). The Act limits NEPA review by requiring that any action to enforce the statute's disclosure requirements be brought within 60 days of the alleged violation. 10 U.S.C. § 2905(c)(3). Thus, without eliminating

> Defendants point out that NEPA claims have been used to delay earlier base closures; they conclude that Congress expressed its intent to prevent procedural challenges in general by specifically excluding most of the new base closure process from compliance with NEPA. Plaintiffs look at the same facts and come to the opposite conclusion: By explicitly precluding only one kind of judicial review (NEPA), Congress intended all other kinds of review to be available. That two utterly inconsistent, yet plausible arguments may be fashioned from the same legislative expression is an example of why the Supreme Court has said, '[t]he existence of an express preclusion of judicial review in one section of a statute is a factor relevant to congressional intent, but it is not conclusive with respect to reviewability under other sections of the statute.' *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977). In short, we conclude that § 2905(c) does not constitute clear evidence of congressional intent with respect to all judicial review under the Act.

971 F.2d at 948. *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986) ("The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent") (quoting Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 771 (1958)).

The foregoing conclusion is consistent with the maxim of statutory construction: *unius est exclusio alterius*, which dictates that a specific statutory exclusion should be construed to exclude *only* that which is specifically excluded. *See, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992) ("enactment of a provision defining the preemptive reach of a

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NEPA's important goals, Congress simply limited NEPA challenges to a 60-day window.

statute implies that matters beyond that reach are not pre-empted"). Because Congress expressly limited only *one* specific form of procedural challenge to the base closure process, it should be presumed that Congress (with knowledge of this Court's holdings that judicial review is presumed unless there is clear and convincing evidence to the contrary) did *not* intend to prohibit other forms of review – particularly the review of claims concerning the procedural fairness and integrity of the base closure process itself.

E. By Joint Resolution Congress Confirmed That The Legislative Veto Provision Was Not Intended As A Substitute For Judicial Review.

Petitioners suggest that evidence of congressional intent to eliminate all judicial review may be discerned from the Act's "legislative veto" provision and stretch even further and claim that the integrity of the Act "quite explicitly relies on oversight by Congress to see that the law is observed." [Brief at 48]. This argument is totally contradicted by the structure and declared purpose of the Act. Congress not only has a maximum of only 45 days to pass a joint resolution disapproving the base closure package in its entirety, but any debate on such resolution is limited to a scant *two hours*, to be "divided equally between those favoring and those opposing the resolution." § 2687(d)(2). This is hardly clear and convincing evidence that Congress intended to assume responsibility for assuring the procedural integrity of the base closure process.[30]

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[30] Indeed, accepting *arguendo* Petitioners' position that the President must sign any such joint resolution for it to be effective (Pet. for Cert. at 5), the President would have veto power to decide base closures. Such a veto would be virtually impossible to override in the limited time and circumstances provided for Congress to act. If Congress had intended to give the President unilateral authority to close bases, the Base Closure Act would have been unnecessary.

Even if there were any lingering doubt on the issue, Congress in fact passed a joint resolution expressly confirming that its legislative veto power was *not* intended to supplant judicial review of "fair process":

> It is the sense of . . . [Congress] that in acting on the Joint Resolution of Disapproval of the 1991 Base Closure Commission's recommendations, the Congress takes no position on whether there has been compliance by the Base Closure Commission, and the Department of Defense with the requirements of the Defense Base Closure and Realignment Act of 1990. Further, the vote on the Resolution of Disapproval shall not be interpreted to imply Congressional approval of all actions taken by the Base Closure Commission and the Department of Defense in fulfillment of the responsibilities and duties conferred upon them by the Defense Base [Closure] and Realignment Act of 1990, but only the approval of the recommendations issued by the Base Closure Commission.

S. Res. 1216, 102nd Congress, 1st Sess., 137 Cong. Rec. 135, 13781-13811. *See also Kennedy for President Committee v. Federal Election Comm.*, 734 F.2d 1558, 1563 n.7 (D.C. Cir. 1984) ("we do not believe that the simple existence of a legislative veto provision should immunize an agency from challenges that its action oversteps its statutory authority"). Accordingly, judicial review of the procedural integrity of the base closure process manifestly remains the province of the federal judiciary.[31]

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[31] Petitioners also attempt to insulate their conduct from judicial review by arguing that there is no adequate remedy for their egregious misconduct. However, the Shipyard could simply be removed from the 1991 closure list.

III. THE BASE CLOSURE ACT WOULD BE UNCONSTITUTIONAL IF READ TO PRECLUDE ALL FORMS OF JUDICIAL REVIEW.

If the Act were construed to abrogate all forms of judicial review, including constitutional claims, two constitutional questions would arise: (1) would the Act unconstitutionally delegate legislative power to the executive branch? and (2) would the Act unconstitutionally abrogate the power of the federal judiciary to review constitutional claims? *See, e.g., United States v. Nixon*, 418 U.S. 683, 705 (1974) ("We . . . reaffirm that it is the province and duty of this Court 'to say what the law is'. . . . "). To avoid both questions, this Court should affirm the decision below. *See Concrete Pipe & Products of California, Inc. v. Const. Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2283 (1993) ("if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided"). This Court's reluctance to address constitutional issues unnecessarily is particularly acute where, as here, those issues "concern the relative powers of coordinate branches of government." *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 466 (1989). *See also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

A. Without Judicial Review, The Act Would Unconstitutionally Delegate Legislative Power To The Executive Branch.

The doctrine prohibiting Congress from delegating its legislative power "is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The

Court has "long . . . insisted that the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another branch." *Id.* at 371-72 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892)). As Justice Scalia noted in his dissent in *Mistretta*:

> It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.

488 U.S. at 415 (Scalia, J., dissenting). As the Court held in the context of a challenge to wartime economic regulation, delegation of legislative power is:

> constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. *Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.*

American Power & Light Co. v. Securities and Exchange Comm., 329 U.S. 90, 105 (1946) (emphasis added).

Although the doctrine of unconstitutional delegation necessarily is balanced against a recognition that Congress must have the resources and flexibility to perform its legislative function, *see, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935), Congressional delegation of power is still subject to careful scrutiny. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring); *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting). The delegation doctrine "ensur[es] that courts charged with reviewing the exercise of legislative discretion will be able to test that exercise against ascertainable standards." *Industrial Union*, 448 U.S. at 686. *See also*

Touby v. United States, 111 S. Ct. 1752, 1758 (1991) (Marshall, J., concurring) ("judicial review perfects a delegated lawmaking scheme by assuring that the exercise of such power remains within statutory bounds"). Delegation of legislative power will survive constitutional scrutiny only "so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed.' " *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quoting *Yakus v. United States*, 321 U.S. 414 (1944)). Thus, judicial review is a critical component of a valid statutory delegation.

As in *American Power & Light*, 329 U.S. at 105, the fate of domestic military bases presents substantial and basic issues of public policy. In the Act, Congress has delegated a great portion of its authority to make base closure decisions to the executive branch (*i.e.*, the Secretary of Defense and the Commission), but *subject* to stringent procedural mandates. A serious constitutional question would therefore arise if the courts were stripped of their historic jurisdiction to review whether the Secretary and the Commission have each complied with the will of Congress by following the mandated procedures. To avoid this constitutional issue, the Act should be read to permit judicial review. *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 367 (1974) ("it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional questions may be avoided").

B. Judicial Review Of Constitutional Claims Cannot Be Abrogated.

As concluded below, the question of "whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review." 995 F.2d at 409. Petitioners nonetheless argue that Congress did not intend for there to be judicial review under the Act, even of constitutional issues. However, imparting such broad intent to Congress would raise a serious constitutional issue because

Congress has not and could not place executive branch conduct beyond constitutional scrutiny. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

In *Webster*, a discharged CIA employee brought both APA and constitutional claims against the Agency's Director. In light of the Director's broad statutory authority with respect to employment decisions, the court held the Director's decision to discharge plaintiff was not subject to APA review. Despite significant national security concerns, however, the *Webster* Court concluded that the Act did not – and possibly could not – be construed to preclude review of the former employee's constitutional claims:

> In [CIA's] view, all Agency employment termination decisions, even those based on policies normally repugnant to the Constitution, are given over to the absolute discretion of the Director, and are hence unreviewable under the APA. We do not think § 102(c) may be read to exclude review of constitutional claims. We emphasized in *Johnson v. Robinson*, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid *'the serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.*

486 U.S. at 603 (emphasis added) (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). At a minimum, the issue whether or not the Secretary, the Commission and the President have transgressed the limits of their statutory authority presents a "colorable constitutional claim." As with the issue of unconstitutional delegation, this issue can be avoided by determining that the Act permits review of Respondents' constitutional claims. *See, e.g., A & M Brand Realty Corp. v. Woods*, 93 F. Supp. 715, 717 (D.D.C. 1950) (construing statute to authorize judicial

review to avoid constitutional issue raised if statute were construed to prohibit review).[32]

[32] An association known as "Business Executives for National Security" ("BENS") – two members of which were members of the 1991 base closure commission and defendants in this case – has filed an *amicus* brief supporting reversal of the decision below. Arguing backwards, BENS suggests that congressional intent to eliminate all judicial review under the Act can be discerned from the fact that, as a matter of recent experience, conversion of military installations to civilian use is easier without the threat of judicial intervention and the attendant delays of litigation. Of course, most executive branch decisions could be implemented more simply and more expeditiously without the specter of judicial review. Such a bold statement of bureaucratic absolutism, however, has no place in our constitutional order. *See, e.g., Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (executive branch officer cannot claim immunity from judicial process where he is "acting in excess of authority or under an authority not validly conferred"). If expedition had been Congress' only goal in passing the Act, there would have been no need to pass it. The plain language of the Act itself memorializes Congress' goal of ensuring that a "fair process" is employed in closing bases.

CONCLUSION

For the foregoing reasons, the decisions of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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January 5, 1994
Philadelphia, Pennsylvania

Document Separator

May 27, 1992

MEMORANDUM FOR CHAIRMAN COURTER

FROM: ROBERT MOORE Bob Moore
OF COUNSEL, SPECTER AND LORING CASES

SUBJECT: Litigation Update

1. LORING CASE - Cohen, et al v. Rice, et al

Last week, Judge Brody of the U.S. District Court, District of Maine, granted our motion to dismiss in part, and denied it in part. He threw out all but two allegations by the Loring plaintiffs, finding that most of their charges were not judicially reviewable. The two issues that the Court found to be subject to judicial review are:

1) Plaintiffs' contention that the Secretary of Defense failed to transmit to the GAO, Members of Congress and the Commission all of the information used in making the base closure recommendation.
2) Plaintiffs' contention that the Commission failed to hold public hearings as required by the act.

Judge Brody stated his intention to hear these issues on an expedited basis and has planned a telephonic scheduling conference for tomorrow that DOJ, Matt and I can participate in. The Department of Justice is very pleased with the decision and successful findings by the Maine Court could be helpful later, as the Philadelphia case unfolds.

2. PHILADELPHIA CASE, Specter, et al v. Garrett, et al

Denying the petition by the Commission, the Navy, DoD, DOJ, and the Solicitor General, the 3rd Circuit voted not to rehear the Specter case en banc. Our options therefore are to litigate in District Court on the limited number of procedural issues the 3rd Circuit found are judicially reviewable, or to file a writ of certiorari with the Supreme Court. DOJ has 90 days to file the writ and they have asked for the Commission's recommendations within the next 30 days. At this time, our codefendants and the Department of Justice staff are pondering whether to seek cert or not. I will develop the pros and cons of that action and will brief you and Matt so that we can make a recommendation to DOJ by the end of June.

I've enclosed the Decision by the Court in Loring. I think you'll find it interesting reading. Commissioner Cassidy will undoubtedly be pleased that the Court found the use of "quality of life" non justiciable (opinion, p. 9). The Philadelphia rehearing denial is enclosed as well.

Please call me if you have any questions. otherwise I'll talk to you and Matt over the next few weeks.

cc: Matt Behrmann

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SEN. WILLIAM S. COHEN, et al.,

Plaintiffs,

v.

DONALD RICE,
Secretary of the Air Force,
et al.,

Defendants.

CIVIL NO. 91-0282-B

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Plaintiffs, United States Senators William S. Cohen and George J. Mitchell, United States Representative Olympia J. Snowe, Governor John R. McKernan, Jr., the Towns of Limestown, Ashland, Caswell, Fort Fairfield, Mars Hill, New Sweden, Van Buren, the Cities of Caribou and Presque Isle, Aroostook County, the Save Loring Committee, Paul D. Haines, the American Federation of Government Employees Local Union Chapter # 2943 and Alan Mulherin, seek to enjoin the Secretary of Defense from carrying out the decision to close Loring Air Force Base ("Loring" or the "Base"), and refrain from taking any actions that may interfere with the ability of Loring to operate as if it was not slated for closure. Plaintiffs also request the Court to declare: (i) that the realignment recommendation to close Loring, provided by the Secretaries of the Air Force and Defense, to have been developed in a manner inconsistent with the requirements of the Base Closure

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Act, Pub. L. No. 101-510 Title XXIX ("Base Closure Act" or the "Act"); (ii) that the Secretaries' adoption of the closure recommendation, the findings and conclusions made by the Air Force with respect to the decision to close Loring to have been arbitrary and capricious and otherwise not in conformity with law; and (iii) that the closure and realignment recommendations submitted by the Commission to the President with respect to Loring to have been made in violation of the Act.

I. BACKGROUND

This controversy revolves around the decision to close Loring. Loring, located in Limestone, Maine, is one of twenty-one Strategic Air Command Bases maintained by the Air Force in the continental United States. During April 1991, pursuant to the Base Closure Act, the Secretary of Defense recommended that fourteen Air Force facilities be closed, including Loring, and that six be realigned. See 56 Fed. Reg. 15184 (April 15, 1991). Thereafter, the Base Closing Commission engaged in an analysis and review of the Secretary's recommendations. The Commission ultimately recommended that one of the Air Force facilities recommended for closure by the Secretary remain open, but concurred with the Secretary's recommendation that Loring be closed.

On July 10, 1991, President Bush approved the recommendations of the Commission. See 27 Weekly Comp. Pres. Doc. 930 (July 15, 1991). Following the President's approval, the House

and Senate Armed Services Committees held hearings on the Commission's recommendations.

On July 30, 1991, as permitted by Section 2908 of the Act, the House considered a resolution, sponsored by Congressional plaintiff Rep. Snowe, to disapprove the Commission's recommendations. See 137 Cong. Rec. H6006 (daily ed. July 31, 1991). The House entertained floor debate on the proposal, including the objections of Rep. Snowe which parallel the allegations here set forth. Id. By a vote of 364 to 60, the House rejected the proposal, thus permitting the closure and realignment process to continue. See 137 Cong. Rec. H6039.

Having exhausted their remedies in the political arena, the plaintiffs brought their challenge to the Court. Defendants moved to dismiss the plaintiffs' complaint on February 28, 1992. The Court heard oral argument on May 4, 1992, and that motion is now before the Court.

II. BALANCING TEST

The issue in this proceeding revolves around two competing interests that must be kept in balance. On the one hand, it is critical that base closings not be subject to the type of political and judicial delays that prompted the passage of the 1990 Act in the first instance. For more than a decade before the passage of the 1990 Act, nearly every attempt to close or realign

a major base had been thwarted by Congress or the Courts.[1] The 1990 Base Closure Act's innovative scheme, utilizing an independent bi-partisan Base Closure Commission, short inflexible time-limits, an all or nothing vote by Congress to accept or reject the President's recommendation package in its entirety, and the exemption of the process from the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., "make it abundantly clear that speed and finality were regarded as indispensable components of the scheme." Specter, U.S. App. LEXIS at 69 (Alito, dissenting). See also 1991 U.S. Code Cong. & Admin. News 3257.

On the other hand, the Court must concern itself with the integrity of the process and the competing principle of fairness. One need look only as far as the Act's stated purpose to find Congress' insistence that the process must be both expeditious and fair. § 2901(b) ("to provided a fair process that will result in the timely closure and realignment of military installations inside the United States."). Basic procedural protections must be preserved in order to insure Congress' stated purpose to ensure that the interests of the communities would be heard and that the process and its consequences would be perceived by the people effected as fair, and would in fact be fair. Fairness must not be sacrificed on the alter of expediency. To the extent that judicial

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1 See, e.g., Base Closure: Joint Hearings on H.R. 1583 to establish the Bipartisan Commission on Consolidation of Military Bases Before the Military Installations and Facilities Subcommittee of the House Committee on Armed Services and Defense Policy Panel, 100th Cong. 2d Sess. 349 (1988)(Statement of Rep. Armey).

review is required, therefore, it must be preserved, albeit to a limited extent, to allow the Court to exercise its "balancing" responsibilities.

III. ANALYSIS

This case presents the same issues as were recently decided by the Third Circuit in Specter v. Garrett, No. 91-1932 (slip op. April 17, 1992)(petition for rehearing en banc pending), 1992 U.S. App. LEXIS 6969 (challenging the recommendations of the Secretary of the Navy and the Commission to close the Philadelphia Naval Shipyards), namely: (i) whether the plaintiffs have standing to sue; (ii) whether the controversy presents a nonjusticiable political question; and (iii) whether the decision to close and realign a base pursuant to the Act is subject to judicial review. Although the decision reached in Specter is not binding upon this Court, the Third Circuit's analysis and conclusions, particularly with regard to the questions of the availability of judicial review and the applicability of the political question doctrine, are not without merit. The Court is persuaded by the reasoning of the court in Specter Parts III and IV, and adopts the Third Circuit's holdings with regard to judicial review and the political question doctrine. Specter, U.S. App. LEXIS at *19-38. With regard to the issue of standing, Specter Part II, the Court has written a separate analysis to more fully explain the basis for denying Defendants' motion to dismiss.

A. STANDING TO SUE

(i) The Union

Standing is "the threshold question in every federal case, determining the power of the Court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). In essence, the inquiry into standing seeks to determine "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations in its exercise." Id.

> Art III requires the party who invokes the Court's authority to show [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury [2] fairly can be traced to the challenged action and [3] is likely to be redressed by a favorable decision.

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982).

In this case, the union plaintiffs[2] clearly satisfy the "actual injury" requirement. Many, if not all of the employees represented in this case will lose their jobs if the decision to close Loring is carried out. It is also indisputable that the injury the employees will suffer is exclusively traceable to the

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[2] To attain representative standing the union must show that: its members individually would have standing to bring the same claims; the interests the union protected by bringing the claims are germane to the union's purposes; and neither the claim nor the relief sought requires individual members to participate in the litigation. Hunt v. Washington State Apple Advertising Comm'n 432 U.S. 333, 343 (1977). The Court finds in this case the union has met its burden.

decision to close the Base. If Loring does not close the union's members will, in all likelihood, keep their jobs.

Plaintiffs' allegations demonstrate that Loring would not have been slated for closure but for the actions of the defendants. While it is true that the Act places in the President the authority to accept or reject the Commission's recommendations, the mere possibility that Congress or the President theoretically could have broken the causal link is insufficient to defeat standing in this case. Moreover, it is not correct to characterize the President's decision not to disapprove the Commission's recommendations as an independent decision unrelated to the Commission's recommendations. There is a but/for causation between the Secretary's decision to put Loring on the closure list, the Commission's recommendation to close Loring and the harm that may be visited upon the union plaintiffs.

Finally, it is clear that the harm the employees will suffer would be redressed, if only temporarily, as a result of the decision to close the Base being enjoined. The Base would remain open, at least temporarily, and as a consequence the employees' jobs would be spared for that period of time.

In addition to satisfying the constitutional requirements of injury in fact, fairly traceable causal connection, and redressibility, a plaintiff must also satisfy several prudential concerns regarding the proper exercise of federal jurisdiction. To this end, the Court has required "that a plaintiff's complaint fall

within the zone of interests protected by the law invoked." Allen v. Wright, 468 U.S. 737, 751 (1984).

As the Supreme Court stated in Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400, (1987):

> The "zone of interest" test is a guide for deciding whether in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Reviewing the Base Closure Act and its legislative history the Court finds that the Union and its members are within the zone of interests meant to be protected by the Act.

> [T]he Act demonstrates Congress' sensitivity to the impact of a base closing on the employees of the base and the community in which they live. Because of this sensitivity, Congress sought to ensure that the interest of the employees and their communities would be heard and that the process would be perceived as fair. To further this objective, Congress provided for opportunities for public hearings and comment. It also provided that if the national interest is found to outweigh those of the local community, economic assistance would be provided to assist in the period of transition . . . . [B]ecause of this congressional concern reflected in the Act and its legislative history, the base closing criteria established by the Secretary of Defense and left unaltered by Congress included among the eight factors to be considered "the economic impact on communities."

Specter, U.S. App. LEXIS at p*17-18 (citations omitted).[3]

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[3] As a matter of judicial economy, generally courts will not adjudicate the standing of each multi-party plaintiff, as long as one plaintiff is found to have standing. Having found such a plaintiff in this case, the Court elects not to resolve the

B. APPLICATION OF SPECTER V. GARRETT TO THE PLAINTIFFS' CLAIMS.

The Court, having adopted the Third Circuit's analysis with regard to the availability of judicial review, is left with the task of line drawing in order to determine which of Plaintiffs' claims are reviewable, and which are not. See Specter, U.S. App. LEXIS at *52.

Count I of Plaintiffs' complaint focuses on the alleged deficiencies in the performances of the Secretaries of the Air Force and Defense. Plaintiffs challenge the decision-making process of the Secretaries and allege that their recommendations deviated from the force structure plan and published criteria; that their recommendations were substantially in error; that they considered an unpublished criterion, "quality of life,"; that they relied on inaccurate and inadequate data and failed to explain these deficiencies to the Commission; that they disregarded their own prioritization schema in evaluating Loring; and that their recommendations were arbitrary and capricious.

Deficiencies in this category are not judicially reviewable. In each case the Court would be required to reevaluate the basis for the Secretaries' decision to close Loring and the relative importance of such data. The Court will not engage in such review for two reasons. First, "the Secretary's recommendations are clearly committed to his discretion under the

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standing issue as to the remaining plaintiffs. The Court notes, however, that this prudential doctrine does not absolve plaintiffs' counsel of its responsibility to ensure that each plaintiff named may properly invoke the jurisdiction of the Court. See Fed. R. Civ. P. 11.

Act." Specter, U.S. App. LEXIS at *43. Second, and perhaps more importantly, Congress provided for alternative methods of review.

> Congress anticipated that questions would be raised about the adequacy of the Secretary's data and analysis. It decided to put these questions to rest and guaranty the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission, and the GAO.

Id. at *46. See e.g., § 2903(d)(2)(B) (the Commission shall review the recommendations of the Secretary and may make changes in any of the recommendations "if the Commission determines that the Secretary deviated substantially from the force-structure plan and the final criteria referred to in subsection (c)(1) in making recommendations."); § 2903(d)(2)(5) (the Comptroller General shall "transmit to Congress and to the Commission a report containing a detailed analysis of the Secretary's recommendations and selection process.").

"Given the nature of this task, it seems clear . . . that an additional review by the courts would not contribute to public confidence in this part of the process . . . ." Specter, U.S. App. LEXIS at *46. The Court finds, therefore, that Plaintiffs' allegations in Count I paragraphs 61-67 (first sentence) and 68(B)-(F) to be unreviewable. Accordingly, Defendants' motion to dismiss is GRANTED with respect to these claims.

However, with regard to Plaintiffs' contention that the Secretary failed to transmit to the GAO, members of Congress and the Commission all of the information used in making the base closure recommendations, the Court finds this claim to be

judicially reviewable. The Commission and the GAO are the bodies charged with the review of the Secretary's recommendations. These bodies must, therefore, have access to all of the information the Secretary relied upon. See § 2903(c)(4). The failure to transmit such information "presents the kind of issues with which courts have traditionally dealt . . . . [S]uch a review seems entirely consistent with Congress' desire to assure the integrity of the decision-making processes." Specter, U.S. App. LEXIS at *47-48.[4]

With regard to Count II, the plaintiffs challenge the decision-making process by which the Commission reviewed the Secretary's recommendations. Specifically the plaintiffs charge that the Commission: utilized an unpublished criterion; failed to apply the published criteria equally to all installations; failed to follow the Air Force's priority schema; and utilized data it knew to be in substantial error.

The Court finds that "each of these challenges go to the merits of the recommendations of the Commission and that the merits of those recommendations, like the merits of the recommendations of the Secretary, are not subject to second guessing by the judiciary." Id. at *50. Accordingly, the Court finds paragraphs 69, 70(a), (c)-(e) are not judicially reviewable and are hereby DISMISSED.

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[4] However, to the extent that the claim is that because of the Air Forces' concealment or errors, the Secretary of Defense failed to consider evidence that he should have considered, judicial review is not available.

Plaintiffs' contention that the Commission failed to hold public hearings as required by the Act, § 2903(d)(1), is subject to judicial review. Such review is "entirely consistent with the congressional intent, [as] reflected in the Act and its legislative history. By so holding, we do not, of course, endorse the proposition that the Commission's failure to reopen its hearings was in conflict with 2903(d)(1)." Specter, U.S. App. LEXIS at *51.

The Court notes that its finding that a small category of claims in this proceeding is subject to judicial review does not

> necessarily mandate judicial relief. Whether or not a violation receives a remedy is something that a court must determine through an exercise of discretion based on the character of the violation and all the surrounding circumstances. Thus judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from square one.

Id. at *40.

Accordingly, Defendants' motion to dismiss is GRANTED in part, and DENIED, in part. Specifically, Defendants' motion to dismiss is DENIED with respect to paragraphs 64(d), 67 (second sentence), 68(A), 70(a)-(b). Given the nature of the complaint and the issues involved, the Court will hear this case on an expedited basis. The Court will hold a scheduling conference within one week from the date of this order.

SO ORDERED.

Morton A. Brody
United States District Judge

Dated at Bangor, Maine this 26th day of May, 1992.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, Secretary of the Navy; RICHARD CHENEY, Secretary of Defense; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,.

U.S. Sen. Arlen Specter,
U.S. Sen. Harris Wofford,
U.S. Sen. Bill Bradley,
U.S. Sen. Frank R. Lautenberg,
Governor Robert P. Casey,
the Commonwealth of Pennsylvania,
Pennsylvania Attorney General
Ernest D. Preate, Jr., Governor
James J. Florio, the State of New
Jersey, New Jersey Attorney
General Robert J. Del Tufo,
Governor Michael N. Castle,
the State of Delaware,
U.S. Rep. Curt Weldon,
U.S. Rep. Thomas Foglietta,
U.S. Rep. Robert E. Andrews,
U.S. Rep. R. Lawrence Coughlin,
U.S. Rep. Peter H. Kostmayer,
U.S. Rep. Robert A. Borski,
the City of Philadelphia,

RECEIVED AND FILED
5-20-92
SALLY MRVOS
Clerk

Howard J. Landry, International Federation of Professional and Technical Engineers, Local 3, William F. Rail, Metals Trades Council, Local 687, Machinists, Ronald Warrington, the Planners Estimators Programmman & Schedulers Union, Local No. 2,

Appellants

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, Circuit Judges

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Alito would have granted rehearing.

By the Court,

Circuit Judge

Dated: MAY 20 1992

Document Separator

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PHOENIX
PITTSBURGH

April 12, 1995

MEMORANDUM FOR **MS. MADELYN R. CREEDON, GENERAL COUNSEL, DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION**
MR. S. ALEXANDER YELLIN, NAVY TEAM LEADER, DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION

FROM: GEORGE R. SCHLOSSBERG

SUBJECT: LEGAL AUTHORITY OF DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION TO CONSIDER PRIVATE SECTOR SHIPYARD CAPACITY

The Defense Base Closure and Realignment Act of 1990, as amended (the "Act"), as implemented and interpreted previously by the Secretary of Defense ("Secretary") and the Defense Base Closure and Realignment Commission ("Commission") in 1991 and 1993, provides this Commission with the authority, if not the duty, to consider, among other things, private sector shipyard capacity in its review of the Department of Defense's 1995 Base Closure Recommendations. Moreover, during the deliberations leading to the 1995 round of base closure recommendations, the Military Departments, the Joint Working Groups, and the Department of Defense used private sector capacity in fashioning their final recommendations to the Commission.

A. Statutory construction of the Act favors consideration of private capacity by the Commission in its closure and realignment recommendations.

To accomplish its statutory goals, the Act established a specific procedure for making recommendations for base closures and realignments. The Secretary is given the responsibility to develop a force structure plan and final criteria to be used in making closure recommendations, and the Commission is given the responsibility to review and make changes to the Secretary's closure recommendations if it determines that the Secretary "deviated substantially" from the force structure plan and final criteria.

Significantly, however, the statute does not delineate either the final criteria themselves, or the factors that are to be encompassed within the final criteria. Rather, the statute is silent as to any of the details of the final criteria. Similarly, the legislative history of the Act reveals that Congress made no attempt to define the final criteria with any greater precision.

Given the complexity of the issues underlying base closures and the specialized nature of the Military Departments, this lack of specific statutory detail is hardly surprising. To the contrary, by declining to set forth the final criteria or the issues to be considered thereunder, Congress followed the frequently employed practice of deliberately casting statutory language in broad terms, and then entrusting an administrative agency with great experience in the field to "fill in the gaps" in the legislation by regulation and then to apply such regulations in a manner consistent with the legislative intent. See, e.g., E.I. duPont de Nemours & Co. v. Collins, 432 U.S. 46 (1977). Ultimately, the authority is given to the Commission to send to the President a final list of recommendations according to their own analysis of the issues and selection criteria.

Under similar broadly written statutory schemes, situations frequently arose where a specific issue in controversy was not addressed directly by the Congress, either in the language of the statute itself or in the legislative history. Under general principles of statutory construction and administrative law, when Congress has not spoken to the precise question at issue, the agency's interpretation of the statute is then consulted. If the agency's interpretation is consistent with the statute's intent and is rationally supported, the agency's interpretation generally is given great deference and is usually deemed to be controlling. See, e.g., Chevron, USA, Inc. v. National Resources Defense Council, 467 U.S. 837 (1984); Sullivan v. Everhart, 494 U.S. 83 (1990); Illinois E.P.A. v. U.S. E.P.A., 947 F.2d 283 (7th Cir. 1991); Difford v. of Health and Human Services, 910 F.2d 1316 (6th Cir. 1990).

These principles are appropriately applied to the issue of the consideration of private capacity in base closure recommendations. The Act is broadly written, is silent on the issue of private capacity as well as on any other factor that is to be considered under the final criteria, and the Secretary is the "expert agency" charged with "filling in the gaps."

An inquiry as to whether private capacity must be considered by the Commission in making its base closure recommendations therefore must now turn to the final selection criteria themselves as adopted by the Secretary. Significantly, however, the Secretary also deliberately left the final criteria somewhat broad and general in nature. The final selection criteria to be used by the Department of Defense to make recommendations to be reviewed by the 1995

Commission are unchanged from the original selection criteria adopted for the 1991 Commission and used also in their entirety by the 1993 Commission. See 59 Fed. Reg. 63769 (1994). For the original criteria, as adopted for the 1995 round of closures, the Secretary of Defense stated that,

> The inherent mission diversity of the Military Departments and Defense Agencies makes it impossible for DoD to specify detailed criteria, or objective measures or factors that could be applied to all bases within a Military Department or Defense Agency. See 56 FR 6374 (1991), appended hereto at **Tab A.**

In its adoption of the final criteria in 1991, its published 1991 policy guidance addressing those criteria, and its reaffirmation of those criteria in their entirety in 1993 and 1995, the Secretary established the "regulations" pursuant to which closure recommendations are to be made. Therefore, with respect to any particular issue not specifically addressed in the statute, such as whether private capacity must be considered under the final criteria, general principles of statutory construction as set forth in the Chevron line of cases require that the Secretary's interpretations are to apply, as long as they are consistent with the intent of the statute.

Therefore, that the express language of the final selection criteria does not explicitly mention private capacity is of little importance, because clearly the intent of the Secretary in adopting the final criteria was not to specify each and every factor that is to be considered under those criteria. To the contrary, such specificity was deliberately avoided.

However, in response to concerns voiced by commenting parties on the need for more detailed information as to how the criteria were to be applied, the Secretary published in the Federal Register a "policy guidance" that had been issued to the Military Departments and Defense Agencies on the base closure process. Id. at 6375. In that policy guidance, the Secretary explicitly specifies, in response to comments recommending that the capacity of the private sector to support or perform military missions be considered, that such availability is "already included" in Final Criteria Number One and Four. Id. at 6376.

Because the Secretary, acting as the expert agency in filling in the gaps of a general statute, has specified in a formal policy notice that consideration of private capacity is included in the final selection criteria,[1] the Commission is charged clearly with the duty to review private sector shipyard capacity during its deliberations.

However, even in the absence of this express policy guidance, private capacity still must be considered logically by the Secretary and the Commission under Criteria Number 1, in order for the agency's application of the guidelines to be consistent with the overall policies and objectives of the Act. The second clause of Criteria No. 1 ("the impact on operational readiness of the Department of Defenses's total force"), by its terms, requires that the Secretary consider available private capacity when assessing the impact of a base closure on the readiness of the force, or else the goals of saving money, achieving an efficient military force, eliminating unnecessary facilities, and streamlining the defense infrastructure will not be able to be achievable.

In other words, in order for the closure process to be able to further the efficiency of the military, save money, and still meet the needs of the force, adequate private repair and maintenance facilities available in a particular area--for example, the West Coast or Southern California--must be considered. To the extent that adequate private repair and maintenance facilities are available in a particular area that can satisfy the military's need for operational readiness, the closing of a public facility in that area can be recommended for closure under this criteria. In fact, closing a public facility under such circumstances would further the legislative intent of the statute, in that military funds could instead be used more efficiently on operational activities and keeping open public repair and maintenance facilities in those areas where adequate private capacity is not already present; Criteria number 1 can therefore be satisfied through a combination of public and private facilities.

Thus, the consideration of the availability of private facilities by the Commission in the final criteria is proper, therefore making it appropriate for the Commission to consider the private capacity issue at this time. Most importantly, in a recent Supreme Court review of the Act, the Court concluded that the past actions of the Secretary and the Commission were both

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[1] As stated above, the 1991 final criteria were adopted unchanged by the Secretary for use as the final selection criteria in the 1993 and 1995 closure process. See 57 Fed. Reg. 59335 (1992).

legitimate and proper. Dalton v. Specter 114 S. Ct. 1719 (1994), 128 L.Ed. 2d 497 (1994). Accordingly, the Commission should continue to act as it has in previous rounds and review private sector capacity during its deliberations.

B. Private capacity must be considered if the goals and policy objectives of the Act are to be achieved.

The overall purposes and objectives of the Act must be a primary consideration underlying base closure recommendations. It is a general principle of statutory construction that in interpreting statutory language, the aims, principles, and policies that underlie the statute are to provide guidance. See, e.g., Crandon v. United States. 494 U.S. 152 (1990), citing Kmart Corp. v. Cartier Inc., 486 U.S. 281(1988), and Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 51(1987); Aulston v. U.S., 915 F.2d 584 (l0th Cir. 1990), cert. denied, 111 S.Ct. 2011(1991). With respect to the Act, its clear language and legislative history identify the purposes and goals to be achieved through the base closure process.

The purpose of the Act, as set forth in § 2901 (b), is to "provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Another purpose of the Act is to save money. The legislative history of the Act provides useful background as to the purpose of the closure and realignment procedures.

The overall goal of the base closure process was succinctly stated by Congresswoman Schroeder during the floor debate on the base closure proposals of the House Armed Services Committee, as follows:

> *[w]e need to close bases to save money. We need to close bases as the size of the force comes down. We need to close bases because the current base structure is inefficient." 126 Cong. Rec. 7462 (daily ed. September 12, 1990).*[2]

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[2] Congresswoman Schroeder was one of the co-authors of the House Armed Services Committee's base closure proposals. Her debate in support of the Committee's proposal repeatedly emphasized that "the Committee proposal guarantees that bases will be closed and the taxpayers will save money." 126 Cong. Rec. 7463 (daily ed. September 12,1990). The report of this Committee similarly "recognizes the need to close bases" because "[t]he size of the American military will likely decline by 25 percent over the next few years. Fewer troops means fewer bases will be required." H.R. Rep. No. 665, 101st Cong., 2nd Sess. 383. The Committee Report also stresses that the process for the

An examination of the legislative history of the 1988 Defense Authorization Amendments and Base Closure and Realignment Act, as amended, P.L. 100-526, 102 Stat. 2623, the predecessor to the 1990 Act and which originated a base closure procedure similar in purpose and effect to that adopted in the 1990 Act, also is instructive.[3] For example, the House Armed Services Committee Report on H.R. 4481, on which much of the text of the bill that eventually was passed by Congress in 1988 was based, states that one of the issues that would have to be considered before a base could be closed or realigned is the extent and timing of potential cost savings. H.R. Rep. No. 735(I), 100th Cong., 2nd Sess. 1, 8,11,13. In this regard, the report quotes from testimony by the Secretary before the committee that stated that "savings from closing a base are significant and perpetual." Id. at 8. Similarly, the committee report of the Government Operations Committee on the same bill expressed its support of the "goal of effecting savings by expediting the closure of unneeded military facilities." H.R. Rep. No. 735(II), 100th Cong., 2nd Sess. 10.

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closure of military installations must be based on "economy and utility" pursuant to objective criteria designed to achieve, "effectively and efficiently," the military plans of the department as reflected in a force structure plan. Id. at 383, 61990 U.S. Code Cong. & Ad. News 3076. The Senate Armed Services Committee also recognized that reductions in military personnel and the need for deficit reduction would trigger a significant number of base closures. S. Rep. No. 384,101st Cong., 2nd Sess. 295.

[3] This statute created a base closure process which, like the procedure adopted in the 1990 statute, established a Commission on Base Realignment and Closure. The 1988 Commission's statutory task was to transmit a report to the Secretary and the Armed Services Committees of the Senate and the House of Representatives recommending military installations for closure or realignment; expedited procedures for approval or disapproval of the Commission's recommendations by the President and Congress were also established, and closures or realignments approved pursuant to the expedited procedures would be implemented by the Secretary according to a timetable. Defense Base Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, Title II --Closure and Realignment of Military installations (codified at 10 U.S.C. 2687 note).

That the overall goals of the base closure statutes are to effect cost savings in an efficient and expeditious manner in order to implement defense budgetary cuts is echoed in this Commission's 1991 and 1993 Reports to the President. In its 1993 Recommendations, the Commission notes in its opening letter to the President that continuing budget constraints, along with changing national security requirements compel the United States to reduce and realign its military forces. See 1993 Defense Base Closure and Realignment Commission Report to the President at vi. In its introductory sections in the 1991 Report, the Commission states that because of DoD's plans to decrease the military by 25%, there is a need to eliminate unnecessary facilities so that the more limited military dollars may go to vital military needs. See 1991 Defense Base Closure and Realignment Commission Report to the President at vi.

The government cannot accomplish the goal of saving money if the Secretary makes base closure recommendations on the premise that Navy shipyards will perform virtually all of the Navy's ship repair and overhaul requirements, thereby ignoring the reality that private shipyards perform approximately 35 percent of those requirements. In fact, the Congress has acknowledged the important role the private sector plays in providing support to the Services as well as the need to maintain a commercial industrial mobilization base by providing that up to 40 percent of the funds made available in a fiscal year to a military department or a Defense Agency for depot-level maintenance and repair workload may be used to contract for that performance with the private sector. 10 U.S.C. § 2466.

Thus, the goal of achieving cost savings must include consideration of private sector capacity and capabilities. As set forth in the Government Accounting Office's March 1988 Report on Navy Maintenance, the Navy policy set forth in DoD Directive No. 4151.1 (originally adopted in 1974 and repealed in the wake of the enactment of section 2466 of title 10, United States Code), is in accord with Congress' intent to permit 40 percent of all Navy ship repair, overhaul and alteration work to go to private shipyards. GAO/NSIAD-88-109, dated March 25, 1988, Navy Maintenance, Competing Vessel Overhauls and Repairs Between Public and Private Shipyards at 18. For many years, Department of Defense Appropriation Acts directed a specified dollar amount be applied to private sector contractors that roughly equated to the then 70/30 split. Id. Because that congressional intent was well established at the time of enactment of the 1990 Base Closure Act and its predecessor 1988 Act, those Acts by necessity contemplated that the capacity of the private sector must be included for the purpose of achieving cost savings in determining which military bases to close.

C. Prior private capacity consideration by the Commission is appropriate and proper and this practice should be continued by the Commission in their 1995 recommendations for closure and realignment.

That the availability of private capacity is an appropriate and necessary factor to be considered in an evaluation of base closure recommendations under the final criteria is highlighted by the fact that private capacity was considered by this Commission in making its 1991 and 1993 closure and realignment recommendations.

In 1993 the Base Closure Commission wrote in its final recommendation to the President to close Mare Island Naval Shipyard, California:

> *When relocating a function from a closing shipyard, the Navy should determine the availability of the required capability from another DoD entity or the private sector prior to the expenditure of resources to recreate the capability at another shipyard.*
> See 1993 Defense Base Closure and Realignment Commission Report to the President at 1-16.

Similarly, a significant factor in the 1991 recommendations by the Commission concerning the Philadelphia Naval Shipyard was the availability of suitable private shipyard alternatives on the East Coast. For example, in evaluating options for Philadelphia, the Commission concluded that although the need for contingency capability for carrier drydocking on the East coast existed, that need could be met sufficiently through a combination of mothballing at Philadelphia and the use of the Norfolk Naval Shipyard (a public facility), and the Newport News Shipbuilding and Dry Dock Company (a private facility.)

Moreover, the use of private capacity is further underscored by the deliberations of the Military Departments and the Joint Working Groups that led to the 1995 DoD recommendations to the Commission. For example, during the March 7, 1995 Commission hearing, Secretary of the Army Togo West testified that "civilian capacity was a player" in the Army's analysis of its hospital medical capacity and its determination as to which facilities to close and realign. Secretary West stated:

> *It was one of the ways in which we were able to decide that we could dispense with a center here or downgrade a hospital to a clinic there.*

. . .

> *And so, at least at the level at which I reviewed it, excess civilian capacity did not influence me so much as the certainty that with civilian capacity, we could be sure that that where we were making an adjustment there were still going to be proper medical care and treatment for those who depend on the Army.* [sic] [March 7, 1995 Transcript pp. 90-91]

The Army also considered private capacity in the area of military ports in the United States. Secretary West testified further before the Commission that with regard to the Army's 1995 recommendation to close Military Ocean Terminal Bayonne, New Jersey:

> *...we in the Army are fairly comfortable with using commercial ports in most cases. There are greater assurances of commercial port availability on the East Coast than the West. So just as a matter of prudent planning, we elected to keep Oakland open, while we felt very comfortable that we could close Bayonne and realize the savings from that action.* [See March 7, 1995 Transcript pp. 101-102]

In addition, all three Military Departments considered the availability of housing in the private sector in their 1995 evaluations of their military installations. Specifically, the Department of the Navy, in its Community Infrastructure Impact Analysis, included information on the ability of existing infrastructure in the local community, to absorb additional Navy personnel and missions. Installations were asked to assess the impact of increases in base personnel on off-base housing availability, public and private school, health care facilities and other off-base private recreational activities. See page 33 of the Department of the Navy Analyses and Recommendations (Volume IV), March 1995. The Air Force, in its installation evaluation criteria considered off-base housing affordability and its suitability in its evaluation of community infrastructure, as well as, off-base recreational and hospital facilities. See page 69 of the Department of the Air Force Analyses and Recommendations (Volume V), February 1995. Similarly, the Department of the Army used off-base housing for soldiers and families in its overall evaluation of Land Facilities as provided for by the DoD. See page 24 of the Department of the Army Analyses and Recommendation (Volume II).

Private capacity was also evaluated and considered by the Joint Cross Service Groups. In particular, during the March 7, 1995 Commission hearing on recommendations by the Army, Brigadier General Shane of the Department of the Army testified that excess civilian capacity was considered in the hospital Joint Cross Service process. In response to Commissioner

Steele's question with regard to the Army's recommended closure of Fitzsimmons Army Medical Center and the continued ability of the Services to meet the military need in the area, the General responded:

> *...it goes back to the question that Commissioner Robles asked in regards to excess capacity -- civilian capacity that exists. It is my understanding that the Joint Cross Servicing Group looked at that real hard and supported this recommendation from the Army, and determined that there was capacity and that there would not be a major problem with the diversion of that tri-care service throughout the area.*
> [March 7, 1995 Transcript pp. 95-96]

That the Commission relied upon the availability of private capacity in making closure and realignment recommendations in 1993 and 1991, and that the Military Departments and the Joint Cross Service Working Groups evaluated the capacity of the private sector when making their 1995 recommendations, is clearly dispositive as to whether private capacity may be considered by the Commission at this time as well.

D. Conclusion

One of the primary purposes of the Act is to avoid wasting money on public facilities that are excess to meeting the military's requirements. That purpose can be accomplished only if the Secretary and the Commission base their Navy shipyard closure recommendations on the Nation's entire ship repair and maintenance capability. Accordingly, we believe it is appropriate and proper for the Commission to consider private sector shipyard capacity when deciding which shipyards to recommend for closure or realignment.

Enclosure: as stated.

cc. w/ enclosure: Mr. Larry Jackson

Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

a. The action will not result in any additional reporting, recordkeeping or other compliance requirements.

b. The action will not have a serious economic impact on any contractors for the service listed.

c. The action will result in authorizing small entities to provide the service procured by the Government.

Accordingly, the following service is hereby added to the Procurement List: Commissary Shelf Stocking & Custodial, Fitzsimmons Army Medical Center, Denver, Colorado.

This action does not affect contracts awarded prior to the effective date of this addition or options exercised under those contracts.

E.R. Alley, Jr.,

Deputy Executive Director.

[FR Doc. 91–3704 Filed 2–14–91; 8:45 am]

BILLING CODE 6820-33-M

Procurement List Proposed Additions

AGENCY: Committee for Purchase from the Blind and Other Severely Handicapped.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to the Procurement List commodities to be produced and services to be provided by workshops for the blind or other severely handicapped.

COMMENTS MUST BE RECEIVED ON OR BEFORE: March 18, 1991.

ADDRESSES: Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202–3509.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman, (703) 557–1145.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodities and services listed below from workshops for the blind or other severely handicapped. It is proposed to add the following commodities and services to the Procurement List:

Commodities

Case, Ear Plug

6515–01–212–9452.

(Remaining 20 percent of Government's Requirement)

Wash Kit, Personal

7360–00–139–1063

Bag, Parts

8105–LL–B00–0208
8105–LL–B00–0209
8105–LL–B00–0210
8105–LL–B00–9974
8105–LL–B00–9975

(Requirements of Mare Island Naval Shipyard, CA)

Services

Janitorial/Custodial: Department of the Army, Coralville Reservoir, Coralville Lake, Iowa.

Janitorial/Custodial, Internal Revenue Service Center, 3651 South Interregional Highway 35, Austin, Texas

Sending and Oiling Picnic Tables, Deschutes National Forest, Bend Ranger District, Bend, Oregon.

E.R. Alley, Jr.,

Deputy Executive Director.

[FR Doc. 91–3705 Filed 2–14–91; 8:45 am]

BILLING CODE 6820-33-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Selection Criteria for Closing and Realigning Military Installations Inside the United States

AGENCY: Department of Defense (DoD).

ACTION: Final selection criteria.

SUMMARY: The Secretary of Defense, in accordance with section 2903(b), title XXIX, part A of the FY 1991 National Defense Authorization Act, is required to publish the proposed selection criteria to be used by the Department of Defense in making recommendations for the closure or realignment of military installations insikde the United States.

EFFECTIVE DATE: February 15, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. Jim Whittaker or Ms. Patricia Walker, Base Closure and Utilization, OASD(P&L), (703) 614–5356.

SUPPLEMENTARY INFORMATION:

A. Final Selection Criteria

The final criteria to be used by the Department of Defense to make recommendations for the closure or realignment of military installations inside the United States under title XXIX, part A of the National Defense Authorization Act for Fiscal Year 1991 as follows:

In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:

Military Value

1. The current and future mission requirements and the impact on operational readiness of the Department of Defense's total force.

2. The availability and condition of land, facilities and associated airspace at both the existing and potential receiving locations.

3. The ability to accommodate contingency, mobilization, and future total force requriements at both the existing and potential receiving locations.

4. The cost and manpower implications.

Return on Investment

5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.

Impacts

6. The economic impact on communities.

7. The ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel.

8. The environmental impact.

B. Analysis of Public Comments

The Department of Defense (DoD) received 169 public comments in response to the proposed DoD selection criteria for closing and realigning military installations inside the United States. The public's comments can be grouped into four topics: General, military value, costs and "payback", and impacts. The following is an analysis of these comments.

(1) General Comments

(a) A substantial number of commentors expressed concern over the proposed criteria's broad nature and similiarity to the 1988 Defense Secretary's Base Realignment and Closure Commission criteria. Many of the comments noted a need for objective measures or factors for the criteria. Some commentors also suggested various standard measures or factors for

the criteria. The inherent mission diversity of the Military Departments and Defense Agencies (DoD Components) makes it impossible for DoD to specify detailed criteria, or objective measures or factors that could be applied to all bases within a Military Department or Defense Agency. We have provided the commentors' letters to each Military Department for their consideration. The similarity to the 1988 Base Closure Commission criteria is acknowledged. After reviewing the public comments we concluded that using similar criteria is appropriate.

(b) Many commentors noted that a correlation between force structure and the criteria was not present. The base closure and realignment procedures mandated by title XXIX, part A, of the National Defense Authorization Act for Fiscal Year 1991 (the Act) require that the Secretary of Defense's recommendations for closure and realignment be founded on the force structure plan and the final criteria required by the Act. DoD's analytical and decision processes for applying the final criteria will be based on the force structure plan. The military value criteria provide the connection to the force structure plan.

(c) Many commentors noted the need for more detailed information on how DoD would implement the base closure procedures required by the Act. A recurrent suggestion was to group like bases into categories for analysis. In response to this comment and suggestion, and to respond to the general comments (a) and (b) above, we have issued policy guidance to the Military Departments and Defense Agencies on the base closure process. This guidance requires them to:

- Treat all bases equally: They must consider all bases equally in selecting bases for closure or realignment under the Act, without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department. This policy does not appply to closures or realignments that fall below the thresholds established by the Act or to the 86 bases closed under Public Law 100-526;
- Categorize bases: They must categorize bases with like missions, capabilities and/or attributes for analysis and review, to ensure that like bases are fairly compared with each other; and
- Perform a capacity analysis: They must link force structure changes described in the force structure plan with the existing force and bases structure, to determine if a potential for closure or realignment exists. In the event a determination is made that no excess capacity exists in a category, then there will be no need to continue the analysis of that category, unless there is a military value or other reason to continue the analysis;
- Develop and Use Objective Measures/Factors: They must develop and use objective measures or factors within categories for each criterion, whenever feasible. We recognize that it will not always be possible to develop appropriate objective measures or factors, and that measures/factors (whether they be objective or subjective) may vary for different categories of bases.

(d) A number of commentors recommended assigning specific weights to individual criteria. It would be impossible for DoD to specify weights for each criterion that could be applied across the board to all bases, again due to the mission diversity of the Military Departments and Defense Agencies. It appears from the comments that numbering the criteria may have been mistaken as an order of precedence associated with individual criteria. We do not intend to assign an order of precedence to an individual criterion, other than to give priority to the first four.

(e) Several commentors gave various reasons why a particular installation should be eliminated from any closure or realignment evaluation. Public Law 101-510 directs DoD to evaluate all installations equally, exclusive of those covered under Public Law 100-526 or those falling below the threshold of section 2687, title 10, U.S. Code. Public Law 100-526 implemented the recommendations of the 1988 Defense Secretary's Commission on Base Realignment and Closure. We have issued guidance to the DoD Components instructing them to consider all bases equally, this includes those previously nominated for study in the Defense Secretary's January 29, 1990, base realignment and closure announcement that are above the thresholds established in the Act. Conversely, we did not receive any requests that a particular installation be closed or realigned pursuant to section 2924 of Public Law 101-510.

(f) A number of commentors noted a need for more management controls over data collection to ensure accuracy of data. We agree with this recommendation and have issued guidance that requires the DoD Components to develop and implement internal controls, consistent with their organizational and program structure, to ensure the accuracy of data collection and analyses being performed. This guidance incorporates the lessons learned from the General Accounting Office's review of the 1988 Base Closure Commission's work.

(g) After detailed consideration of all comments, we have determined that some of the criteria may have been unclear. We have revised the criteria for additional clarity.

(h) Some of the early comments we received recommended extending the original December 31, 1990, public comment deadline. We agreed and extended the public comment period to January 24, 1991. In addition, we accepted for consideration 19 public comments received after the January 24, 1991, deadline.

(2) Military Value Comments

(a) A majority of comments received supported DoD's decision to give priority consideration to the military value criteria. In the aggregate, military value refers to the collection of attributes that describe how well a base supports its assigned force structure and missions.

(b) Several commentors recommended that National Guard and Reserve Component forces be included as part of DoD's base closure analysis. The Department's total force concept includes National Guard and Reserve Component forces, and these forces will be reflected in the force structure plan required by the Act for this base closure process. To clarify that point, criteria number one and three were amended.

(c) Some commentors recommended DoD apply the military value criteria without regard to the DoD component currently operating or receiving the services of the base. The commentors noted that this would maximize utilization of Defense assets and therefore improve the national security. We agree with this comment. DoD must retain its best bases and where there is a potential to consolidate, share or exchange assets, that potential will be pursued. We also recognize that this potential does not exist among all categories of bases and that the initial determination of the military value of bases must be made by the DoD Component currently operating the base. Consequently, we have left the military value criteria general in nature and therefore applicable DoD-wide, where appropriate. We have also issued guidance to the DoD Components that encourages inter-service and multi-service asset sharing and exchange. Finally, we will institute procedures to ensure each DoD Component has the opportunity to improve the military value of its base structure through

analysis of potential exchanges of bases with other DoD Components.

(d) Some commentors recommended we include the availability of airspace in our considerations of military value. We agree and have revised criterion number two accordingly.

(e) Several commentors requested a geographic balance be maintained when considering installations for realignment or closure. DoD is required by Public Law 101-510 to evaluate all installations equally, exclusive of those covered under Public Law 100-526 or those falling below the thresholds of section 2687, title 10, U.S. Code. However, some measures of military value do have a geographic component and therefore military mission requirements can drive geographic location considerations.

(f) Some commentors recommended that the availability of trained civil service employees be considered as well as the capacity of the private sector to support or perform military missions. DoD's civil service employees are an integral part of successful accomplishment of defense missions, as are defense contractors whether they be nationally or locally based. To the extent that the availability of trained civilian or contractor work forces influences our ability to accomplish the mission, it is already included in criteria number one and four.

(g) Several commentors recommended that mobilization potential of bases be considered and that those bases required for mobilization be retained. Contingency and mobilization requirements are an important military value consideration and were already included in criterion number three. The potential to accommodate contingency and mobilization requirements is a factor at both existing and potential receiving locations, and we have amended criterion number three accordingly.

(h) One commentor recommended retaining all bases supporting operation Desert Shield/Storm and another recommended including overseas bases. DoD must balance its future base structure with the forces described in the force structure plan, and not on the current basing situation. Some forces currently supporting Operation Desert Storm are scheduled for drawdown between 1991 and 1997. DoD must adjust its base structure accordingly. Overseas bases will also be closed in the future as we drawdown DoD's overseas forces. However, Congress specifically left overseas base closures out of the base closure procedures established by the Act.

(3) Cost and "Payback" Comments

(a) Some commentors recommended calculating total federal government costs in DoD's cost and "payback" calculations. A number of such comments gave as examples of federal government costs, health care and unemployment costs. The DoD Components annually budget for health care and unemployment costs. We have instructed the DoD Components to include DoD costs for health care and unemployment, associated with closures or realignments, in the cost calculations.

(b) Several commentors noted the absence of a "payback" period and some felt that perhaps eight or ten years should be specified. We decided not to do this; we did not want to rule out making changes that were beneficial to the national security that would have longer returns on investment. The 1988 Base Closure Commission felt that a six-year "payback" unnecessarily constrained their choices. The DoD Componentes have been directed to calculate return on investment for each closure or realignment recommendation, to consider it in their deliberations, and to report it in their justifications. Criterion number five has been amended accordingly.

(c) Some commentors recommended including environmental clean-up costs in base closure cost and payback calculations. Some also noted that the cost of environmental clean-up at a particular base could be so great that the Department should remove the base from further closure consideration.

The DoD is required by law to address two distinctly different types of environmental costs.

The first cost involves the clean-up and disposal of environmental hazards in order to correct past practices and return the site to a safe condition. This is commonly referred to as environmental restoration. DoD has a legal obligation under the Defense Environmental Restoration Program and the Comprehensive Environmental Response, Compensation and Liability Act for environmental restoration at sites, regardless of a decision to close a base. Therefore, these costs will not be considered in DoD's cost calculations. Where installations have unique contamination problems requiring environmental restoration, these will be identified as a potential limitation on near-term community reuse of the installation.

The second cost involves ensuring existing practices are in compliance with the Clean Air, Clean Water, Resource Conservation and Recovery Act, and other environmental acts, in order to control current and future pollution. This is commonly referred to as environmental compliance. Environmental compliance costs can potentially be avoided by ceasing the existing practice through the closure or realignment of a base. On the other hand, environmental compliance costs may be a factor in determining appropriate closure, realignment, or receiving location options. In either case, the environmental compliance costs or cost avoidances may be a factor considered in the cost and return on investment calculations. The Department has issued guidance to the DoD Components on this issue.

(d) Some commentors recommended DoD change the cost and "payback" criteria to include uniform guidelines for calculating costs and savings. We agree that costs and savings must be calculated uniformly. We have improved the Cost of Base Realignment Actions (COBRA) model used by the 1988 Base Closure Commission and have provided it to the DoD Components for calculations of costs, savings, and return on investment.

(4) Impacts Comments

(a) Many commentors were concerned about social and economic impacts on communities and how they would be factored into the decision process. We have issued instructions to the DoD Components to calculate economic impact by measuring the effects on direct and indirest employment for each recommended closure or realignment. These effects will be determined by using statisical information obtained from the Departments of Labor and Commerce. This is consistent with the methodology used by the 1988 Base Closure Commission to measure economic impact. We incorporated the General Accounting Office's suggested improvements for calculation of economic impact. DoD will also determine the direct and indirect employment impacts on receiving bases. We have amended criterion number six to reflect this decision.

(b) The meaning of criterion number seven, "the community support at the receiving locations" was not clear to several commentors. Some wondered if that meant popular support. Others recognized that this criterion referred to a community's infrastructure such as roads, water and sewer treatment plans, schools and the like. To clarify this criterion, we have completely re-written it, while also recognizing that a comparison must be made for both the existing and potential receiving communities.

(c) Many commentors asked how environmental impacts would be considered. As we stated in topic 3(c),) will consider certain environmental ..sts. In addition, we have instructed the DoD Components to consider, at a minimum, the following elements when analyzing environmental consequences of a closure or realignment action:

- Threatened and endangered species
- Wetlands
- Historic and Archeological sites
- Pollution Control
- Hazardous Materials/Wastes
- Land and Air uses
- Programmed environmental costs/ cost avoidances

(d) A number of commenters questioned the meaning of criterion number nine. "The implementation process involved". The intent of this criterion was to describe the implementation plan, its milestones, and the DoD military and civilian employee adjustments (Increases and decreases) at each base, that would result through implementation of the closure or realignment. After further consideration, we have determined that developing the implementation plan is a necessary requirement and conclusion of applying the other eight criteria. A description of implementation plan, while portant to the understanding the recommended closure or realignment, is not in itself a specific criterion for decisionmaking. Consequently, we have deleted criterion number nine. We have nstructed the Military Departments and Defense Agencies to include a lescription of their implementation plans for each recommended closure or realignment, as part of the justification o be submitted to the Commission.

2. Previous Federal Register References

(1) 55 FR49679, November 30, 1990: Proposed selection criteria and request for comments.

(2) 55 FR53536, December 31, 1990: Extend comment period on proposed election criteria.

). Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 6-511) does not apply.

Dated: February 11, 1991.

M. Bynum,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[R Doc. 91-3645 Filed 2-14-91; 8:45 am]

ING CODE 3810-01-M

Department of the Army

Environmental Assessment; Exoatmospheric Discrimination Experiment (EDX) Program

AGENCY: U.S. Army Strategic Defense Command (USASDC); DOD.

COOPERATING AGENCY: Strategy Defense Initiative Organization, DOD U.S. Department of the Navy, DOD.

ACTION: Notice of Availability of finding of no significant impact.

SUMMARY: Pursuant to the Council on Environmental Quality regulations for implementing the procedural provisions of the National Environmental Policy Act (40 CFR parts 1500-1508), Army Regulation 200-2, Chief of Naval Operations Instruction 5090.1, and the Department of Defense (DOD) Directive 6050.1 on Environmental Effects in the United States of DOD actions, the USASDC has conducted an assessment of the potential environmental consequences of conducting EDX program activities for the Strategic Defense Initiative Organization. The Environmental Assessment considered all potential impacts of the proposed action alone and in conjunction with ongoing activities. The finding of no significant impact summarizes the results of the evaluations of EDX activities at the proposed installations. The discussion focuses on those locations where there was a potential for significant impacts and mitigation measures that would reduce the potential impact to a level of no significance. Alternatives to the EDX launch facility were examined early in the siting process but were eliminated as unreasonable. A no-action alternative was also considered. The Environmental Assessment resulted in a finding of no significant impact. Construction will proceed as scheduled, however, due to budgetary constraints, the flight program implementation has been delayed. When the flight schedule becomes firm, this document will be reviewed and revised, as necessary, in light of any changes to the program.

DATES: Written comments are required by March 18, 1991.

POINT OF CONTACT: Mr. D.R. Gallien, Address: U.S. Army Strategic Defense Command, CSSD-EN, Post Office Box 1500, Huntsville, AL 35807-3801, Fax (205) 955-3958.

SUPPLEMENTARY INFORMATION: The USASDC was assigned the mission of acquiring critical mid-course data on ballistic missile re-entry vehicles and decoys; EDX would accomplish this mission. The EDX program would use the ARIES booster to launch a suborbital sensor into space to observe a target ballistic missile re-entry complex during the mid-course phase of its flight. The proposed EDX program would involve nine flights over three years from two different launch sites after October 1993: The target complex would be released from a MINUTEMAN I missile launched from Vandenberg Air Force Base, California and the EDX booster and sensor payload vehicle would be launched from the Kauai Test Facility (KTF), located on the Pacific Missile Range Facility (PMRF), Kauai, Hawaii. Current launch use activities would continue, however, pubic access through these areas would be limited for a total of less than 1 day over a three year period.

The EDX program would include a number of activities to be conducted at seven different sites. These activities are categorized as design, fabrication/assembly/testing, construction, flight preparation, launch/flight/data collection, payload recovery, sensor payload vehicle refurbishment, data analysis, and site maintenance/disposition. The locations and types of EDX activities are: Vandenberg Air Force Base, California/Western Test Range, flight preparation, launch/flight/data collection; Pacific Missile Range Facility, Kauai, Hawaii, construction, flight preparation, launch/flight/data collection, payload recovery, sensor payload vehicle refurbishment, site maintenance/disposition; Sandia National Laboratories, New Mexico, design, fabrication/assembly/testing; U.S. Army Kwajalein Atoll, Republic of the Marshall Islands, flight preparation, launch/flight/data collection; Hill Air Force Base, Utah, fabrication/assembly/testing; Space Dynamics Laboratory, Utah State University, Logan, Utah, design, fabrication/assembly/testing, data analysis; and Boeing Aerospace and Electronics, Kent Space Center, Kent, Washington, design, fabrication/assembly/testing, sensor payload vehicle refurbishment, data analysis.

To determine the potential for significant environmental impacts as a result of the EDX program, the magnitude and frequency of the tests that would be conducted at the proposed locations were compared to the current activities and existing conditions at those locations. To assess possible impacts, each activity was evaluated in the context of the following environmental components: Air quality, biological resources, cultural resources, hazardous materials/waste, infrastructure, land use, noise, public